No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FRANK M. WANLESS,
Petitioner,

vs.

RHONDA ROTHBALLER and THE PEORIA JOURNAL STAR, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER OR NOT GUIDANCE FROM THIS COURT IS NECESSARY TO ALLOW THE LOWER COURTS TO PROVIDE A CONSISTENT APPLICATION OF THE DOCTRINE OF INDEPENDENT REVIEW ON THE ISSUE OF ACTUAL MALICE.

II. WHETHER OR NOT A REVIEWING COURT CAN PROPERLY DETERMINE ISSUES OF CREDIBILITY AND DEMEANOR IN ASSESSING THE PROPRIETY OF A JURY VERDICT IN FAVOR OF A PUBLIC OFFICIAL IN A LIBEL SUIT.

III. WHETHER OR NOT AN INDEPENDENT REVIEW IS NECESSARY IN A PUBLIC FIGURE LIBEL CASE WHERE THE PLAINTIFF HAS THE BURDEN OF SHOWING ACTUAL MALICE BY CONVINCING CLARITY AND THE JURY IS INSTRUCTED PROPERLY ON THOSE ISSUES.

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Illinois is reported at 115 Ill. 2d 158 (1987) and is set forth in the Appendix at A-1.

The modified opinion of the Third District Appellate Court of Illinois is reported at 136 Ill. App. 3d 321 (3rd Dist. 1985) and set forth in the Appendix at A-21. The original of the Third District Appellate Court of Illinois is unreported, but set forth in the Appendix at page A-34.

JURISDICTIONAL STATEMENT

This action for libel was filed by Frank Wanless in the Tenth Judicial Circuit Court of Illinois on December 29, 1977. After a

trial by jury, a verdict was returned on March 29, 1984 in favor of the plaintiff and against both defendants. Compensatory damages were fixed in the sum of $250,000 against both defendants. Punitive damages were imposed in the sum of $1,000 against Rothballer and $249,000 against The Journal Star.

Both defendants appealed to the Appellate Court of Third District of the State of Illinois. In an opinion dated August 14, 1985, the Appellate Court reversed the jury's verdict. On September 11, 1985, petitioners filed with the Third District Appellate Court a Motion for Rehearing which was denied and a modified opinion filed by the court on October 17, 1985.

On November 20, 1985, plaintiff filed in the Supreme Court of Illinois a Petition for Appeal as a Matter of Right or In The Alternative, for Leave to Appeal, which was granted on February 5, 1986. In an opinion filed December 19, 1986, the Supreme Court of Illinois affirmed the Order of the Third District Appellate Court reversing the jury verdict. Plaintiff filed a Motion for Rehearing on January 9, 1987 which was denied by the Supreme Court of Illinois on January 30, 1987. Jurisdiction over this matter is conferred on this Court by 28 U.S.C. § 1257(3) (1986).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in part: "Congress shall make no law...abridging the freedom of speech, or of the press...."

The Seventh Amendment provides: "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The Fourteenth Amendment to the United States Constitution, § 1, provides in part: "No state shall make or enforce any

law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Frank Wanless is an attorney who was, in addition to his private practice, part-time Village Attorney for the Village of Morton, Illinois, whose population at the time was about 10,000. On January 20, 1977, the Peoria Journal Star published, on one page, three separate articles. Each of those articles charged Frank Wanless with profiting privately from his duties as Village Attorney for the Village of Morton. Each of those articles, written by Rhonda Rothballer, has been found by the jury and all reviewing judges to have been false.

In the fall of 1977, by reason of the articles, it is undisputed that Wanless lost his job as Village Attorney and lost substantial income from his private practice by reason of those publications.

Rhonda Rothballer was inexperienced. She was graduated from journalism school in December, 1974. In August, 1976, she was tranferred from the City to the State Desk. Her first assignment was to investigate "controversy" regarding governmental affairs in the Village of Morton. This controversy was being generated by a two member minority faction of the seven member Village Board, who were making accusations of conflicts of interest by Board Members in the conduct of Village business.

Rothballer had access to any Village official she wished to interview, as well as to all Village records she desired to review.

The first article charged that Frank Wanless had been paid twice for the same work. The article adopted the two minority

members' view that the preparation of annexation papers for contiguous landowners wishing to annex to the Village was something which the Village Attorney should not do. The evidence showed, as the jury and the reviewing courts agreed, that there was no occasion on which Frank Wanless was paid by the Village of Morton and a private landowner for the preparation of annexation papers. Rothballer even admitted that she never saw such a charge and knew better.

The defendants also claim that Wanless obtained a free sewer for one of his clients who was developing a subdivision that was annexing to the Village. The evidence established, as the jury and the reviewing judges agreed, that the sewer was not free, nor did Wanless ever make any representation that he represented the developer. This was reinforced by an independent investigation conducted by a reported for another local newspaper who, accessing the same public records, concluded that there was no free sewer and published that fact a few days later.

The newspaper, in a separate article, charged Wanless with failing to provide itemized billings to support his charges for legal services. The Village official responsible for the payment of Wanless' bills testified at trial and produced the itemized billings. The newspaper ignored the existence of such itemized bills.

Lastly, the newspaper complained about a rezoning ordinance drafted five years prior to the publication of the article, and charged that the rezoning of the property multiplied the value of land belonging to Wanless' wife. The property in question was farm land which was purchased by Mrs. Wanless. The reporter admitted that she knew the seller was aware that the land was to be rezoned and assumed that that was taken into consideration in setting the purchase price, facts which did not appear in her article. Moreover, it was undisputed that the rezoning ordinance was prepared by Mr. Wanless at the direc-

tion of the Village Board to bring the zoning in conformity to the Village plan with many other parcels of land. A principal source for this article was a property owner who was angry because his land had not been rezoned. The reporter testified she did not identify him in the article as a source for that reason, yet she stated his charges as fact.

Rothballer's primary source for the charges being made against Wanless was Ruth Ferguson, the leader of the minority two member faction of the Village Board. Ferguson was also about to run for Mayor in opposition to the majority party candidate.

None of these charges were presented to Frank Wanless prior to publication for his comment or rebuttal.

While the articles were reviewed by three levels of editors at The Journal Star, none of those editors accepted the responsibility for checking the sources used by Rothballer. The editors were aware that the articles were controversial and could do damage to Wanless' reputation, but the publication was authorized in a two-minute conference. One of the editors admitted that this was not the usual standard of journalism. The editor of the newspaper testified that the truth of falsity of the articles was not his concern, but rather whether or not Wanless was "defenseless."

Following a three-week trial, the jury returned a verdict in favor of the plaintiff and against both defendants. Compensatory damages were awarded in the sum of $250,000 with additional punitive damages in the sum of $249,000 against the newspaper, and $1,000 against the reporter.

The trial judge, in considering post-trial motions, stated for the record that he was making an independent review of the record. In so doing, he found the record to have sustained the verdict and affirmed the judgment. Both the Third District Appellate Court and the Illinois Supreme Court conducted an "independent review" of the record. Their opinions did not

challenge the adequacy or correctness of the instructions to the jury. They determined that the plaintiff had not established with convincing clarity that the defendants had acted with "actual malice" in their view.

The Illinois Supreme Court found that the defendants carried out their investigation carelessly and without thoughtful consideration of the damaging effects their claims might have upon the plaintiff's reputation and acknowledged that those claims were false. However, they emphasized that there was no duty to conduct a further investigation to corroborate a source where there is no reason to doubt the veracity or trustworthiness of the source.

Plaintiff asserts that both reviewing courts' conduct of the independent review, authorized by this Court's opinion in *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), necessitated the resolution of issues involved in credibility and demeanor of the witnesses and, as such, was not a decision that the jury's verdict penalized protected speech, but merely constituted a substitution of the appellate judges' judgment for that of the jury.

ARGUMENT

The jury and each judge who has reviewed this case has found that The Journal Star printed lies about Frank Wanless in his conduct of the office of Village Attorney, a part-time position for the Village of Morton, Illinois. The Journal Star has not challenged the amount of damages awarded, either those compensatory damages for the failure to print the truth or those punitive damages for the failure to discern the truth. Yet, because he is a public official, these admitted wrongs are to be unremedied. The judges of the Illinois Supreme Court have substituted their finding for that of the jury and denied recompense to Wanless.

We do not believe that this Court intended to deny a right of trial by jury to those so situated as the plaintiff. Frank Wanless respectfully requests this Court to provide guidance and definition to the reviewing courts in order to give content the doctrine of independent review so that it may be applied consistently and professionally, or, in the alternative, to abandon the necessity for independent review in a public figure libel case.

The Illinois Supreme Court's decision reflects an erroneous application of the doctrine of independent review. Plaintiff suggests that this erroneous application is the result of the lack of balance between the protections afforded the press and the individual's right to a trial by jury. The reason for that lack of balance is the inadequacies of an appellate court acting as a finder of fact when it does not possess the hallmark of a finder of fact, the ability to observe and evaluate the demeanor and credibility of the witnesses.

The Illinois Supreme Court held that its duty required it to conduct a *de novo* review of the record and find upon its own examination of the facts whether clear and convincing evidence of actual malice was presented, 115 Ill.2d at 169. It also found that it should not re-examine and re-find those discrete facts

[e.g., what was done or said by the parties and the accuracy of the defendants' news accounts] (Citations omitted), nor should it disregard the fact finder's impressions of each witness's credibility. *Id.* at 169-70. The court then proceeded to do what it said it could not do and to redetermine the ultimate facts.

The jury was instructed on the necessary burden of proof as well as the definition of actual malice. The court does not take issue with the adequacy of those instructions. In its opinion, however, the court decided a crucial fact adversely to the Plaintiff and contrary to the jury's verdict. The court stated that the protections of the First Amendment are not lost merely because the writer relied upon partisan sources *where there was no reason to question their veracity* (emphasis supplied). *Id.* at p. 171-72. The opinion went on to state, with regard to the editorial responsibility:

> Reckless disregard cannot be inferred merely because the defendants did not double check their facts supplied by known sources, *unless there was reason to doubt their trustworthiness* (emphasis supplied).

Id. at 172. The only conclusion that can be drawn from this language, and the opinion in general, is that that court has decided that there was no reason to doubt the trustworthiness of the sources used by Rhonda Rothballer. The jury heard and saw the sources and determined that no reasonable reporter could have relied on them. That was the jury's function.

That issue was placed squarely before the jury throughout the course of the three-week trial. The jury heard and observed those people that were sources for the stories published by The Journal Star. The verdict in favor of Frank Wanless and against the newspaper was necessitated by the jury's findings that it was not reasonable for Rhonda Rothballer to rely solely on information supplied to her by these political opponents of Frank Wanless without checking or corroborating that information with neutral sources.

Any reliance upon such "information" would constitute reckless disregard *because* there was reason to doubt the trustworthiness of those sources in the circumstances. The defendants offered no evidence that their reporter's sources were reliable. There was not attempt to corroborate the information of these political opponents of Wanless with neutral or even biased sources. The credibility and the assessment of reliability that could reasonably be placed in those witnesses is something which is uniquely within the jury's grasp. To have decided adversely to the Plaintiff and contrary to the jury verdict that those witnesses were reliable goes beyond the function of the reviewing court, even where an independent review is being conducted. *Bose v. Consumer's Union of the United States, Inc.*, 692 F.2d 189, 195 (1st Cir. 1982), *aff'd.* 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), *rehearing denied,* 467 U.S. 1267, 104 S.Ct. 3561, 82 L.Ed.2d 863 (1984). The Illinois Supreme Court does not declare that the jury has overstepped constitutional boundaries but only that it disagrees with the jury's findings.

The opinion ignored the parallels between the facts of this case and those of *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). In *Butts,* as here, the defendants did not check on the reliability of witnesses who provided the information, despite obvious reasons to doubt their veracity. Given the absence of "hot news" and the knowledge of the likely damage those charges would do, the failure to produce such corroboration was sufficient to establish actual malice.

The Supreme Court of Illinois' opinion recognizes, as did the Appellate Court's, the trial judge's ruling on the post-trial motion, and the jury verdict, that the charges which were published about Frank Wanless were false and the investigation was done in a careless, reckless fashion and not in accordance with traditional journalistic practices. However, the Illinois Supreme Court ignores and omits from its reasoning the evidentiary value

of the cumulative impact of all the errors and falsifications by The Journal Star and its reporter as evidence of actual malice. The opinion ignores the decisions of this Court that proof of the requisite mental state can be inferred from an accumulation of circumstantial evidence. *St. Amant v. Thompson,* 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968).

It has been cited to this Court that over 70 percent of jury verdicts are overturned by appellate courts exercising their obligation to conduct an independent review (Brief for Amicus Curiae, *New York Times Co., et al.* at 17, *Bose,* 104 S.Ct. 1949). Regardless of whether this statistic is used to support the argument that juries, even when properly instructed, cannot be entrusted with responsibility of deciding factual issues in accordance with the constitutional principles or that appellate judges cannot adequately conduct a factual review based upon the cold record, either interpretation misses the central point. Too many people are unaware and unable to predict the results of their libel suits, thus clogging up the courts with unnecessary trials and the appellate courts with interminable reviews.

Guidance, in the form of rules, is necessary to allow an informed and professional review of public figure libel cases so that litigants can predict the value of their evidence and courts can consistently apply the standards to that evidence. If the actual malice test is designed to draw a line between protected and unprotected speech, even the news media must welcome some guidelines.

It is difficult, if not impossible, to define "reckless disregard" in a manner which can be applied inflexibly to the many various fact circumstances which will be presented. However, the existence of certain objective facts, which can easily be shown by the evidence if they exist, can be sufficient to establish such reckless disregard on the part of the media defendant.

In this circumstance, the reporter relied for her information on political opponents of the Plaintiff. None of the information was corroborated. In fact, a great deal of contrary information existed which, if taken into account, would certainly have created doubts in the mind of the reporter as to the accuracy of her story. The reporter testified that she conducted an extensive investigation but had thrown away all of her notes prior to trial. The Plaintiff's only opportunity to challenge the reasonableness of the reporter's profession of belief in her stories was to present the sources and allow the jury to assess their reliability.

Plaintiff suggests that when one, in researching a story, relies solely on sources whose interests are adversarial to the subject's, and that information subsequently is proven to be false, and the jury returns a verdict on proper instructions, in favor of the plaintiff, that the proof of the relying solely or substantially upon adversarial sources without corroboration be deemed, upon review, *per se* reckless disregard because the bias of such a reportorial technique is inherent. Such a rule for appellate courts would then present them with the circumstance that would preserve the ability of the jury to assess the reliability of the reporter and the reporter's sources.

Plaintiff further suggests, as a guide to the lower court's attempting to conduct an independent review, that where the statement is false and the defendant puts forth no evidence to show a source for that statement, sufficient evidence of actual malice has been established. In this circumstance, the reporter and newspaper charged that Wanless was paid twice for the same work. When the reporter testified, she could not find a source who had told her that. Instead, she testified that she has concluded it but had nothing to rely on for that conclusion. The reporter also charged in her article that Frank Wanless had said he was the attorney for a real estate developer which subsequently annexed to the City of Morton. Frank Wanless was charged with having obtained a free sewer for "his client", the

developer. The plaintiff proved that there was no August, 1975 meeting nor was there any such statement by Frank Wanless. The reporter had no source and could identify no evidence from which it could be reasonably concluded that she thought there was an August, 1975 meeting, nor could she attribute the statement that Wanless identified himself as the attorney for the developer to any other occasion. The reporter also charged that the sewer obtained by the developer was free but she had not inquired of the developer whether or not he had made any payments for the sewer nor did she ask Wanless about that fact. She had no source for the conclusion that there was a "free sewer" but again testified that that was something she had concluded, but was unable to produce any evidence to support the conclusion.

Wanless would further suggest that in circumstances where inexperienced reporters are being used, and such reporters have not developed a record for accuracy in past reporting, the editors' responsibilities is greater. In this circumstance, not one of the three reviewing editors checked the reporter's sources, and gave only a cursory review to the substance of her articles, but at the same time admitted that they were aware that the subject matter of the article could do great damage to Frank Wanless' reputation. The failure to conduct such an editorial review constitutes reckless disregard, which was reflected in the disparity between the punitive damages assessed against the reporter, vis-a-vis the newspaper. It was the editor's opinion that the truth or falsity was irrelevant, that the newspaper could play games with Wanless' reputation because he was not "defenseless." The Illinois Supreme Court agreed and has interpreted this Court to have required such a result.

Fourth, it may be appropriate for this Court to hold that where the subject matter of the stories is not "hot news," the reporter or the publisher give the public official an opportunity to rebut or provide neutral sources for the subject matter of the story.

Finally, when the publisher prints a series of articles about the same individual which touch on different aspects of his professional and personal life, and each of those articles contain falsehoods or untruths, that that cumulative falsity be considered in support of the jury's finding of actual malice or reckless disregard.

The existence of such objective facts would restrict the necessity for an independent review and reserve that intrusive aspect of appellate review to those cases where such objective facts do not exist and yet, the finder of fact has found in favor of the plaintiff. The role of independent review as a device for the defining of constitutional concepts would be preserved while reducing the unpredictability of the current practice which allows a subjective analysis of each level of review to be applied to the same facts. An independent review should define constitutional concepts, not retry the facts.

The Illinois Supreme Court took issue with this Plaintiff's characterization of the standard of review. They stated, relying upon *Bose,* that they were entitled to conduct a *de novo* review of the underlying facts in order to determine whether the "constitutional fact" of actual malice had been established by clear and convincing evidence. Such a posture must necessarily ignore the jury's determination.

This insistence upon a *de novo* review leads the reviewing court down an untenable and unenforceable path because in conducting their self-styled *de novo* review, they are working from a cold transcript rather than observing the demeanor of the witnesses and evaluating their credibility. The traditional reviewing court defers to those facts found by the trier of fact and, assuming those facts to be true, determines whether the legal standard has been satisfied. In this circumstance, Plaintiff respectfully suggests that if one takes the facts presented by the evidence and views them in a light most favorable to the prevailing party at trial (in order to give credit to the jury's ability to

assess the demeanor of the witnesses), it only remains for the reviewing court to determine if the quantum of those facts is adequate to establish the constitutional standard of actual malice.

A jury, observing the testimony of a source whom a reporter has relied upon, can determine whether or not it was reasonable for that reporter to rely on that source without verifying the information that the reporter was receiving. A reviewing judge cannot make that determination. Consequently, a plaintiff can never, except in the most egregious circumstances, establish the unreliability of a source based upon the transcript of that testimony. If a reporter wishes to proceed based upon information from a patently unreliable witness, especially where there is no "hot news" elements to the story, then that reporter and her publisher should not seek refuge in the Constitution.

Plaintiff respectfully suggests that the constitutionally imposed burdens of establishing actual malice, rather than mere negligence, and doing so by clear and convincing evidence, rather than a preponderance of the evidence, are protections which can be consistently enforced and easily predicated. The need for further protection of the press is not demonstrated by allowing a *de novo* review of previously decided facts, if that is what *New York Times* means. Such an independent review lessens the regard for the trier of fact while not performing the constitutional function of preserving a robust debate on public issues. Neither the intentional lie nor the careless error advances society's interest in an uninhibited, robust and wide open debate. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974), quoting *New York Times v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

This lack of consistency and predictability is costly, as can be easily demonstrated by the circumstances of this case. Earlier in the case, Defendants prevailed on a motion for summary judg-

ment. Plaintiff appealed that grant of summary judgment to the same court that the Defendants later appealed this jury verdict. On the appeal of the summary judgment, that appellate court held:

> Plaintiff has shown avenues of investigation not pursued by the Defendants. Plaintiff alleges the Defendants failed to investigate and interview Fred Schmidtgall whose annexation case is part of the alleged conflict of interest. Plaintiff also alleges that the Defendants failed to check the status of the complaint filed against the Plaintiff with the Disciplinary Commission relating to these charges, which complaint was known to the Defendants. These omissions may well be excusable; however, the issues of whether the facts and circumstances of this case disclose a reckless disregard for the truth is not so free from doubt that an answer can be said to exist as a matter of law. The inaccurate statements made by the Defendants that the Plaintiff represented parties before the Village Board and was paid twice for the same work lend additional support to this conclusion.

That same court, when confronted with the evidence after the jury trial they had preserved, said, as a matter of law, that the Plaintiff had not proved reckless disregard for the truth.

Wanless submits that a proper review, consistent with the principles previously enunciated by the United States Supreme Court, will establish that the jury was within constitutional boundaries in determining that Frank Wanless was damaged by falsehoods published about him and which were published with either knowledge that they were false or with reckless disregard for their truth or falsity.

The jury correctly assessed what the reviewing courts could not — the demeanor and credibility of the witnesses — the people who prepared the articles, the people who were used as sources for the articles, the people who were available as sources

for the articles, and the people who reviewed and edited the articles — in determining the state of mind of the newspaper and its reporter.

The jury correctly assessed what the reviewing courts did not — the cumulative conduct of the newspaper in publishing three separate articles attacking Frank Wanless on the basis of information provided by a political opponent, without corroboration and to the exclusion of contradictory and favorable information.

The First Amendment cannot provide protection to The Journal Star or its reporter from the verdict of the jury because the Defendants went beyond the boundaries prescribed for it by the United States Constitution and this Court.

CONCLUSION

Because of the necessity for guidance from this Court on the interpretation and application of the doctrine of independent review, petitioner respectfully requests that the Petition for Certiorari to the Illinois Supreme Court be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

(No. 62683—Judgment affirmed.)

FRANK M. WANLESS,
Appellant,

v.

RHONDA ROTHBALLER *et al.*,
Appellees.

Opinion filed December 19, 1986.—Rehearing denied January 30, 1987.

1. DEFAMATION —*a public official may not recover for defamation unless he shows by clear and convincing evidence that the defendants acted with actual malice, i.e., with knowledge that their statements were false or with reckless disregard to their truth or falsity.* A public official may not be awarded redress by the courts in a defamation action unless he has established by clear and convincing evidence that the defendants made the statements complained of with actual malice, that is, with knowledge that the statements were false or with reckless disregard of whether they were false or not. (Page 167.)

2. DEFAMATION—*a court in an appeal of a defamation action must make an independent review of the record to see if first amendment rights have been violated by the application of libel law.* The first amendment calls upon reviewing courts in defamation actions to conduct an independent review of the entire record to make certain that the application of libel law to the case under review has not overstepped permissible boundaries of State action under the first and fourteenth amendments (U.S. Const., amends. I, XIV). (Page 167.)

3. DEFAMATION—*a de novo review of a public official's defamation suit reexamines the jury's conclusions of "constitutional fact" as to malice but not its findings of "discreet facts"*

as to what happened. A *de novo* review by a court of appeal in a public official's suit for defamation must insure that governing principles of Federal constitutional law have been faithfully applied by the jury to the "discreet facts" (*e.g.*, what was done or said by the parties and the accuracy of the challenged statements) in reaching the jury's conclusions of "constitutional fact" as to the presence of malice, but the reviewing court should not reexamine and refind the "discreet facts," nor should it disregard the fact finder's impressions of each witness' credibility, for the role of such a reviewing court is to independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of actual malice. (Pp. 169-70.)

5. DEFAMATION—*where there is no evidence of knowing falsehoods, de novo review of a public official's defamation suit centers on whether there was reckless disregard for the truth.* Where there is no evidence that the defendants in a public official's suit for defamation purposely published known falsehoods, the question presented for an appellate court's *de novo* review is whether the publication of the challenged statements was made with reckless disregard for the accuracy of their contents. (Page 170.)

6. DEFAMATION—*reckless disregard for whether a statement is false or true is distinguishable from negligence.* Reckless disregard for whether a statement is false or true is distinguishable from mere negligence. (Page 170.)

7. DEFAMATION—*a defendant must have serious doubts as to the truth of his statement to support a finding that it was made in reckless disregard as to its truth or falsity.* To support a finding of actual malice in the form of reckless disregard as to whether a statement is false or true, a plaintiff in a defamation suit must establish that the defendant in fact entertained serious doubts as to the truth of his statement. (Page 170.)

8. DEFAMATION—*an inquiry as to whether there was reckless disregard for the truth is subjective and is not resolved by the defendants' claims that they believed the statements were true.* An inquiry into whether allegedly defamatory statements were made with reckless disregard as to the question of whether they were false or true is necessarily subjective and is not resolved by testimony by the defendants that they believed their statements were true. (Page 170.)

9. DEFAMATION—*recklessness may be found where there are obvious reasons to doubt the veracity of an informant or the accuracy of his reports.* Reckless disregard for the question of whether or not statements are false or true may be found where there are obvious reasons to doubt the veracity of an informant or the accuracy of his reports. (Page 171.)

10. DEFAMATION—*reporters do not lose their first amendment protections merely because they are inexperienced at investigation or rely upon partisan sources whose veracity there is no reason to question.* Reporters cannot be said to lose their first amendment protections merely because they are inexperienced at investigative reporting or rely upon partisan sources where there is no reason to question those sources' veracity. (Pp. 171-72.)

11. DEFAMATION—*failure to investigate allegations of official misconduct that are not seriously doubted, or to solicit the official's comment, does not show actual malice.* Actual malice is not shown by a reporter's failure to investigate allegations of an official's misconduct if the reporter does not seriously doubt the truth of the assertions, and a failure to solicit the official's reaction and permit him to comment is nothing more than a failure to follow a course of investigation and verification. (Page 172.)

12. DEFAMATION—*reckless disregard of truth or falsity cannnot be inferred from failure to double check facts supplied by known sources whose trustworthiness is not in doubt.*

Reckless disregard as to whether allegations are false or true cannot be inferred merely from a failure to double check the facts supplied by known sources, unless there is a reason to doubt their trustworthiness. (Page 172.)

13. DEFAMATION—*journalists are not constitutionally held to higher expectations of accuracy than any other members of the community.* Journalists are not constitutionally held to higher expectations of accuracy than any other members of the community. (Page 172.)

14. DEFAMATION—*the spectre of reckless disregard for the truth by the media is raised where available sources create substantial doubt as to allegations or reveal insufficient information to support them in good faith.* While the media generally have greater resources than the average person to investigate the facts, those greater abilities only raise the spectre of reckless disregard for truth or falsity when their use has revealed either insufficient information to support challenged allegations in good faith or reveals information which creates substantial doubt as to the truth of those allegations. (Page 172.)

15. DEFAMATION—*a publisher is not exposed to legal liability for mistaken allegations of official misconduct where there is a good-faith reason to believe them and no reasons for serious doubt.* Mistaken allegations of misconduct by public officials do not expose a publisher to legal liability where there is a good-faith reason to believe the allegations and no reasons for serious doubt. (Pp. 172-73.)

16. DEFAMATION—*when a reporter and newspaper who may have been careless and failed to investigate thoroughly in alleging misconduct by a village attorney have not been shown to have acted with a reckless disregard for the truth—reversal of jury verdicts.* A reporter and newspaper who may have been careless and failed to investigate thoroughly in alleging misconduct by a village attorney have not been shown to have acted

with reckless disregard for whether the charges were false or true so as to support a finding of actual malice that is essential to the village attorney's recovery in a defamation suit where the newspaper publishes the reporter's stories claiming that the attorney represented petitioners for annexation to the village but also received payment for preparing the same annexation documents from the village itself, that he submitted to the village, for payment, summarized, nondetailed statements of his services, that he took part in the passage of a zoning change that increased the value of land owned by his wife, and that clients of his who were petitioning the village received preferential treatment, but where there is no evidence that the defendants purposefully published known falsehoods and where the plaintiff attorney, by representing both petitioning parties and the village from which those parties sought favorable consideration, created a situation supporting an interpretation of conflict of interest (an interpretation that should not be stripped of its first amendment protection), and where the other charges against the plaintiff, while indicative of a failure to gather all of the facts and fully investigate, represent the sort of inaccuracy that is commonplace in the forum of robust debate to which the rule of *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, applies; and under these circumstances a jury verdict awarding damages to the plaintiff is properly reversed by a reviewing court. (Pp. 162-75.)

RYAN J., took no part.

GOLDENHERSH, J., dissenting.

Appellate citation: 136 Ill. App. 3d 321.

Appeal from the Appellate Court for the Third District; heard in that court on appeal from the Circuit Court of Peoria County, the Hon. Richard E. Eagleton, Judge, presiding.

Heyl, Royster, Voelker & Allen, of Peoria (Lyle W. Allen, Gary D. Nelson, and Elizabeth W. Christensen, of counsel), for appellant.

Ross E. Morris, of Lewiston, for appellees.

JUSTICE SIMON delivered the opinion of the court:

Frank Wanless, the plaintiff, brought this action for libel against defendants, Rhonda Rothballer and the Peoria Journal Star (Journal Star). A jury in the circuit court of Peoria County returned a verdict for the plaintiff and assessed compensatory and punitive damages totaling $500,000. The appellate court reversed the judgments, holding upon its *de novo* review that there was insufficient evidence in the record to convincingly establish the presence of "actual malice," as required in cases such as this where the allegedly libeled party is a public official. (136 Ill. App. 3d 321.) The plaintiff was allowed leave to appeal (94 Ill. 2d R. 315(a)), and he requests this court to consider whether the appellate court utilized the proper standard of review and, if so, whether the record discloses clear and convincing evidence of actual malice.

The plaintiff was village attorney for the village of Morton at the time defendants published the allegedly libelous articles in the January 20, 1977, edition of the Journal Star. On that date, defendants published three stories regarding the plaintiff's conduct as village attorney in the years 1972 through 1976, and those stories completed a series of articles investigating allegations of unethical conduct by Morton village officials.

The lead article on a single page of three articles regarding the plaintiff was headlined "Annexing to Morton ... Village Atty. Wanless Paid By Clients, Taxpayers." It began: "Village Atty. Frank M. Wanless has been paid twice for preparing annexation papers—by the village and by clients wishing to annex to the village." There is evidence that the village of Morton had a policy that any landowner whose property was contiguous with village boundaries could petition for annexation and be annexed upon payment of a fee to the village. Landowners would have to prepare the necessary documents at their own expense, and during his tenure as village attorney, the plaintiff was paid many

times to prepare annexation papers in his capacity as a private attorney. The plaintiff testified that he prepared those papers three or four times a year, and only in cases where the village's annexation fee had already been established. He further testified that attorneys who prepared annexation papers rarely attended meetings of the Morton board of trustees where such petitions were acted upon by majority vote; none of those who testified could recall a case where a properly drafted petition to annnex contiguous land had been denied.

For discharging the duties of village attorney the plaintiff was paid $1,500 every month by the village as a retainer for 60 hours of legal work per month. The village was billed an additional hourly charge for every hour worked in excess of 60 hours in one month; if in any one month the plaintiff devoted fewer than 60 hours to village work, the difference was credited against time in excess of 60 hours expended in other months. About twice a year the plaintiff would submit a bill to the village for the balance of additional hours worked in the previous year. Rothballer described how she came to the conclusion that Wanless had been paid twice for the same work:

> "During the interview with the Plaintiff on October 29, 1976[,] he admitted that he would prepare annexation papers for private individuals when all the rules of annexation were laid down. Based upon these statements to me that the Plaintiff represented private individuals with legal matters which required action by the Board of Trustees of the Village of Morton, by whom the Plaintiff was paid a retainer fee to act as Attorney for said Village, I concluded that the Plaintiff was paid by both his private clients and by the Village of Morton for preparing annexation papers."

The evidence shows that the plaintiff was not retained to prepare, in the sense of drafting, annexation papers for the board of trustees; rather, as set forth above, village policy re-

quired landowners to bear that expense. By vote of the village trustees, that policy was reaffirmed in the spring of 1976. Rothballer wrote in the published article that "[m]any cities pay the attorneys' fees connected with annexation" while Morton policy was to not do so, indicating that she knew that annexing parties were expected to pay attorney fees. Although there was no evidence presented at trial to support the assertion that the plaintiff billed the village (by counting hours against the 60 hours covered by his retainer or counting hours as extra hours) for time spent actually drafting annexation papers, neither was evidence presented to negate the presumption that the plaintiff was paid by the village for his attendance at board meetings where the board of trustees considered or acted upon annexation petitions he had prepared.

Plaintiff's second allegation of libel arises from comments in the same article suggesting that the plaintiff had prepared a sewer-assessment ordinance which benefited his alleged client, WRCL Company, owner of the Waldheim subdivision.

> "At a public hearing in August 1975 for a special assessment sewer project on N. Morton Ave., where Waldheim is located, Wanless said he was the attorney for the subdivision's development company known as WRCL Co.
>
> So, he was representing [village of Morton] Trustee Zobrist [a partner in WRCL Company] in his annexation request, as well as representing the village. He also was preparing the special assessment project that would affect his client Zobrist, and future subdivision dwellers.
>
> * * *
>
> Once that [sewer trunk line] was furnished, the individual lots were assessed for the remainder of the sewer project costs. The entire sewer system for the subdivision was provided without any cost to WRCL Co."

Defendants' representation that the plaintiff drafted all village ordinances pertaining to the sewer-assessment project affecting the Waldheim subdivision was accurate, but there was no public hearing during August 1975 where the plaintiff might have said he was WRCL Company's attorney. The plaintiff denied that he had ever made such a statement, and defendants were unable to identify their source for that allegation. Tazewell County court records show that during court proceedings in December 1975 regarding the sewer project, WRCL Company was represented by the Peoria law firm of Parsons and McGuire. Nonetheless, the plaintiff did prepare the Waldheim annexation papers at the board's request, and he was paid by WRCL Company for that work.

Whether or not WRCL Company received preferential treatment in the delivery of sewer services to the Waldheim subdivision remains a matter of controversy between the parties. Preferential or not, the evidence indicates that WRCL Company did not receive a sewer "without any cost." Documentary evidence admitted at trial shows that WRCL Company paid assessments for the sewer project in 1984, and assessing the individual lots imposed a cost on WRCL Company by reducing the fair market value of its property.

In one of the articles, headlined "Wanless Earned More Than Peoria Attorney Last Year," defendants stated:

> "Each month Wanless attends two board meetings, which take about six hours combined. The remaining 100 hours [of an average 106 hours per month] for which he is paid are not itemized for the board. He submits the bill listing the hours he's worked, and he is paid that amount.
>
> * * *
>
> Although he said he keeps a precise listing of time spent on village business, he doesn't provide those detailed records to the board.
>
> * * *

> For example, his 'rough account' for April 1976 to September 1976 read: 'Legal services rendered in April 1976 to September 1976 in exces of the 60 hours per month covered by retainer fee: 215 at $30 per hour—$6,450.' "

The plaintiff did submit summary bills to the board and village clerk, but Lee Hinnen, chairman of the board's finance and judicial committee, testified that the plaintiff also submitted itemized bills listing for each month the matters for which services were provided and the total hours expended. Itemized bills for the months of May 1975 through January 1976 were admitted as evidence at trial, although itemized bills for the period April through September 1976, the months referred to in defendants' article, were not presented at trial.

In the third article, headlined "Wife's Land Value Benefits From Wanless-Prepared Rezoning Law," defendants reported that "[a] rezoning ordinance prepared by Village Atty. Frank M. Wanless in 1972 multiplied the value of 35 acres of land belonging to his wife." The article said that Mrs. Wanless had contracted to purchase the farmland only two months before it was rezoned from single-family to multifamily residential, although the vendor of the property was aware at the time of sale that his property and 13 other parcels of land were to be rezoned. According to the plaintiff, the rezoning was done at the direction of the board of trustees to correct errors made in a 1969 zoning ordinance. The plaintiff also contended at trial that his wife's land did not increase in value; he argued that the tax assessments on the land had decreased and that the tax assessments on the land had decreased and that if any increase in value had been caused by the rezoning it was accounted for in the purchase price. Defendants countered by producing an expert witness who examined the property and testified that in his opinion the land value had increased following rezoning. On cross-examination, however, the expert conceded that providing sewer lines and other incidentals would be so costly as to make development of the land unprofitable.

Jury deliberations produced nothing more precise than a general verdict for the plaintiff, but it is implicit in the verdict that one or more of the four separate alleged libels was found to be false and defamatory. Although there were factual errors in at least some of the articles, the plaintiff, as a public official, may not be awarded redress by the courts unless he has established by clear and convincing evidence that the defendants made their allegations "with 'actual malice'—that is, with knowledge that [they were] false or with reckless disregard of whether [they were] false or not." *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 279-80, 11 L. Ed. 2d 686, 706, 84 S. Ct. 710, 726.

It is undisputed that the first amendment calls upon reviewing courts to conduct an independent review of the entire record to make certain that application of libel law to the case under review has not overstepped the permissible boundaries of State action under the first and fourteenth amendments (U.S. Const., amends. I, XIV). In cases of public-official libel, *New York Times* requires that we " 'examine for ourselves the statements in issue and the circumstances under which they were made to see ... whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment protect.' " (*New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 285, 11 L. Ed. 2d 686, 709, 84 S. Ct. 710, 728-29, quoting *Pennekamp v. Florida* (1946), 328 U.S. 331, 335, 90 L. Ed. 1295, 1297-98, 66 S. Ct. 1029, 1031.) The *New York Times* requirement of independent review was reiterated in *Bose Corp. v. Consumers Union of United States, Inc.* (1984), 466 U.S. 485, 80 L. Ed. 2d 502, 104 S. Ct. 1949, the court observing that the requirement "reflects a deeply held conviction that judges—and particularly Members of [the Supreme] Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." (466 U.S. 485, 510-11, 80 L. Ed. 2d 502, 523, 104 S. Ct. 1949, 1965.) While the *Bose* court stressed that the duty is

primarily upon the United States Supreme Court, the court also declared that the rule of independent appellate review "is a rule of federal constitutional law" (466 U.S. 485, 510, 80 L. Ed. 2d 502, 523, 104 S. Ct. 1949, 1965), and the supremacy clause of the United States Constitution (U.S. Const., art. VI) mandates that this court protect with equal vigor the values espoused in both the first amendment to the Federal Constitution (*The Gazette, Inc. v. Harris* (1985), 229 Va. 1, ____, 325 S.E.2d 713, 727) and section 4 of article I of the 1970 Illinois Constitution (Ill.. Const. 1970, art. I, sec. 4).

Although in agreement that this court should make an "independent review" of the record to determine whether it clearly and convincingly establishes actual malice, the parties do not agree on what is contemplated by such a review. The plaintiff suggests that the court apply the same standard as that employed by a trial court when deciding a motion for judgment *n.o.v.* (Ill. Rev. Stat. 1985, ch. 110, par. 2—1202); that is, that this court affirm the jury's finding of actual malice unless "all of the evidence, when viewed in its aspect most favorable to the [plaintiff], so overwhelmingly favors [defendant] that no contrary verdict based on that evidence could ever stand." (*Pedrick v. Peoria & Eastern R.R. Co.*. (1967), 37 Ill. 2d 494, 510.) Applying the judgment *n.o.v.* standard, the plaintiff argues that this court should reinstate the jury's verdict as one not "against the manifest weight of the evidence." The defendant, however, accurately asserts that *Bose* calls upon the court to conduct a *de novo* review of the record and find upon its own examination of the facts whether clear and convincing evidence of actual malice was presented.

Bose states that " 'First Amendment questions of "constutional fact" compel [the Supreme] Court's de novo review.' " (*Bose Corp. v. Consumers Union of United States, Inc.* (1984), 466 U.S. 485, 509 n.27, 80 L. Ed. 2d 502, 522 n.27, 104 S. Ct. 1949, 1964 n.27, quoting *Rosenbloom v. Metromedia, Inc.* (1971), 403 U.S. 29, 54, 29 L. Ed. 2d 296, 318, 91 S. Ct. 1811,

1825; see *Bose Corp. v. Consumers Union of United States, Inc.* (1984), 466 U.S. 485, 515, 80 L. Ed. 2d 502, 526, 104 S. Ct. 1949, 1968 (Rehnquist, J., dissenting) ("in the interest of protecting the First Amendment, the Court rejects the 'clearly erroneous' standard of review mandated by Federal Rule of Civil Procedure 52(a) in favor of a '*de novo*' standard of review for the 'constitutional facts' surrounding the 'actual malice' determination").) This court also has the duty to insure that governing principles of Federal constitutional law have been faithfully applied by the jury to the "discrete facts" (*e.g.*, what was done or said by the parties and the accuracy of defendant's news accounts) in reaching its conclusion of "constitutional fact" that the articles were published with *New York Times* actual malice. The court should not reexamine and refind those discrete facts (see *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 285 n.26, 11 L. Ed. 2d 686, 709-10 n.26, 84 S. Ct. 710, 729 n.26), nor should it disregard the fact finder's impressions of each witness' credibility (*The Gazette, Inc. v. Harris* (1985), 229 Va. 1, ____, 325 S.E.2d 713, 727-28; see *Bose Corp. v. Consumers Union of United States, Inc.* (1984), 466 U.S. 485, 499-500, 80 L. Ed. 2d 502, 516, 104 S. Ct. 1949, 1959). But our review of the record in this case is conducted with the awareness that "[j]udges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.' " 466 U.S. 485, 511, 80 L. Ed. 2d 502, 523, 104 S. Ct. 1949, 1965.

There is no evidence that the defendants in this case purposefully published known falsehoods. Therefore, the question presented for this *de novo* review is whether the publication was made with reckless disregard for the accuracy of its contents. Recklessness in this sense must be carefully distinguished from negligence; "defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth." (*Garrison v. Louisiana*(1964), 379 U.S. 64, 79, 13 L.Ed.2d 125, 135,

85 S.Ct. 209, 218.) To find *New York Times* actual malice in this case the plaintiff must establish that defendants "in fact entertained serious doubts as to the truth of [their] publication." (*St. Amant v. Thompson* (1968), 390 U.S. 727, 731, 20 L. Ed. 2d 262, 267, 88 S. Ct. 1323, 1325.) The Inquiry is necessarily subjective (*Bose Corp. v. Consumers Union of United States, Inc.* (1984), 466 U.S. 485, 511 n.30, 80 L. Ed. 2d 502, 524 n.30, 104 S. Ct. 1949, 1965 n.30), but testimony by Rothballer and editors of the Journal Star that they believed the allegations true is not dispositive.

> "The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is *** based wholly on an unverified anonymous telephone call. *** Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *St. Amant v. Thompson* (1968), 390 U.S. 727, 732, 20 L. Ed. 2d 262, 267-68, 88 S. Ct. 1323, 1326.

The plaintiff suggests as general evidence of actual malice that Rothballer was an inexperienced investigative reporter, influenced by a partisan investigator from the Better Government Association who assisted in developing the stories; that Rothballer relied almost exclusively on plaintiff's political opponents in village government and that she did not confirm her information with neutral sources; and that the plaintiff was not informed of the allegations in advance of their publication and given an opportunity to comment. The plaintiff further argues that editors of the Journal Star knew that the plaintiff's reputation would be injured by the stories based on information culled from plaintiff's political opponents, yet they did not check Rothballer's sources. The Journal Star's reckless disregard is apparent, according to the plaintiff, because the decision to publish Rothballer's articles was made following a two-minute discussion by the editors of the Journal Star during which the

accuracy of Rothballer's stories was not considered. The managing editor for the Journal Star at the time of the publication conceded that the truncated conference on whether to publish did not comport with "the usual standard of journalism."

Plaintiff's contentions and appraisal of the evidence do not convincingly establish actual malice. There is no requirement that reporters serve an apprenticeship to earn their first amendment protections; neither are those protections lost merely because the writer relied upon partisan sources where there was no reason to question their veracity. (See *Tunnell v. Edwardsville Intelligencer, Inc.* (1969), 43 Ill. 2d 239, 247 (political animosity is distinguishable from actual malice).) The plaintiff complains that the stories did not constitute "hot news," so defendants should have allowed him to comment upon the allegations prior to their publication. The failure to investigate, however, does not constitute actual malice if the defendants did not seriously doubt the truth of their assertions, and the failure to solicit plaintiff's reaction was nothing more than a failure to follow a course of investigation and verification. See *Catalano v. Pechous* (1980), 83 Ill. 2d 146, 160 (plaintiff's denial would not necessarily lead defendants to doubt the truth of their charges); *Colombo v. Times-Argus Association, Inc.* (1977), 15 Vt. 454, 457, 380 A.2d 80, 84.

The alleged acts of recklessness by editors of the Journal Star also fall short of proving actual malice. As already noted, reckless disregard cannot be inferred merely because defendants did not double check the facts supplied by known sources, unless there is reason to doubt their trustworthiness. (*Kidder v. Anderson* (La. 1978), 54 So. 2d 1306, 1309 (reliance upon sources antagonistic toward the subject of an alleged libel does not constitute actual malice where sources were in a position to know and where their assertions are not so improbable as to engender serious doubt).) Moreover, journalists are not held by the constitution to higher expectations of accuracy than any

other members of the community. While newspapers generally have far greater resources than the average person to investigate the facts, those greater abilities only raise the spectre of reckless disregard when their use has revealed either insufficient information to support the allegations in good faith or information which creates substantial doubt as to the truth of published allegations. Because of "the stake of the people in public business and the conduct of public officials," mistakes made in the middle ground—where there is a good-faith reason to believe defamatory allegations and no reasons for serious doubt—do not expose the publisher to legal liability. *St. Amant v. Thompson* (1968), 390 U.S. 727, 731-32, 20 L. Ed. 2d 262, 267, 88 S. Ct. 132, 1326.

The plaintiff has not convincingly proved that defendants' assertion of double billing should be stripped of its first amendment protection. Mr. Wanless' conduct as a public official was of the utmost interest to local residents, and the ability of the Journal Star to debate his official integrity cut to the very core of first amendment values. By representing both petitioning parties and the municipality from which those parties sought favorable consideration, the plaintiff created a situation in which individuals and news organizations might, in good faith, conclude that the plaintiff conducted his affairs under a conflict of interest. The plaintiff claims that any compensation he might have received from the village for examining annexation papers and attending board meetings was clearly distinct from fees earned for preparing the documents, but the line which the plaintiff draws between his actual drafting of annexation petitions as private counsel and his public function of advising the village government and insuring that annexation requirements were complied with is too tenuous a demarcation upon which to premise a finding of actual malice. In light of the plaintiff's dual representation (although consented to by his clients) and an ongoing controversy between village officials regarding the conduct of the majority faction on the Morton board of trustees, we cannot say that Rothballer's errors of interpretation

are indicative of a reckless disregard for the truth of her allegations. See *Tagawa v. Maui Publishing Co.* (1968), 50 Hawaii 648, 448 P.2d 337 (defendants not guilty of actual malice where they observed county employees working on plaintiff's property and published same as evidence of corruption when investigation would have established that plaintiff was reimbursing county in a lawful arrangement).

In the context of the Waldheim sewer connection, the plaintiff's simultaneous preparation of annexation documents on behalf of WRCL Company and ordinances for the sewer project on behalf of the village lent credence to Rothballer's mistaken belief that the plaintiff had represented WRCL Company in connection with public hearings or court proceedings relating to the sewer-improvement project. That Rothballer knew the plaintiff's preparation of those annexation documents to have been undertaken at the board's request does not indicate that she entertained doubts as to the truth of her assertions. Although the plaintiff was directed by the board to draft the Waldheim annexation petition, the fact that he also received compensation from WRCL Company fostered Rothballer's charges of conflict as well as the inference that his conflict was related to allegedly preferential treatment accorded the Waldheim subdivision. Given the dual position occupied by the plaintiff and the public attention which naturally focuses on the allegedly preferential allocation of governmental resources, "[t]he statement in this case represents the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies." *Bose Corp. v. Consumers Union of United States, Inc.* (1984), 466 U.S. 485, 513, 80 L. Ed. 2d 502, 525, 104 S. Ct. 1949, 1966.

It cannot be said that defendants were reckless in making the statement that the plaintiff offered only a rough accounting of his hours to the board of trustees. Rothballer requested copies of plaintiff's bills from the village clerk, and she was given copies of his summaries only. While a more thorough in-

vestigator might have inquired of the plaintiff whether he also submitted itemized bills, the failure to ask this question does not of itself establish actual malice.

Neither was the report that rezoning multiplied the value of Mrs. Wanless' 35-acre parcel of land shown to have been disseminated with actual malice. In making that assertion, Rothballer relied upon the opinions of trustee Ruth Ferguson (known to Rothballer as a member of the board's minority faction and as a political opponent of the plaintiff's), Ralph Giacinti (a landowner whose property had been denied rezoning) and Morton's superintendent of public works, as well as her own supposition that rezoning property owned by the wife of the village attorney to allow more uses for the land would increase its value. Failure to have the land appraised or to examine changes in the assessed value of the land does not evince actual malice by defendants. Tax assessments are poor indicators of land value (*City of Chicago v. Harrison-Halsted Building Corp.* (1957), 11 Ill. 2d 431, 439), and it was reasonable to conclude that rezoning from single-family to multifamily residential would be beneficial to the landowner and add to the value of the land. Therefore, it cannot be said that defendants made this assertion of opinion with reckless disregard for its probable falsity merely because they did not buttress Rothballer's opinion with an expert appraisal.

Considering all the evidence, this court is of the opinion that the plaintiff has failed to prove the existence of actual malice convincingly. Although Rhonda Rothballer and the Peoria Journal Star carried out their investigation of Frank Wanless and his conduct as village attorney carelessly and without thoughtful consideration of the damaging effects their claims might have upon the plaintiff's reputation if those claims were made in error, carelessness alone cannot support the imposition of damages in this case.

Judgment affirmed.

JUSTICE RYAN took no part in the consideration or decision of this case.

JUSTICE GOLDENHERSH, dissenting:

I dissent. I do not agree with the majority that the evidence was insufficient to sustain the finding, implicit in the jury's verdict, that the statements published by defendants were made with actual malice. In *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, the Supreme Court said that a public official may not recover damages "for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (376 U.S. 254, 279-80, 11 L. Ed. 2d 686, 706, 84 S. Ct. 710, 726.) In my opinion, the evidence here was sufficient to show that these statements were made with reckless disregard of whether or not they were false. The evidence shows that the defendant reporter who prepared the articles obtained much of her information from other officials of the village whom she knew were opposed to plaintiff in a heated political campaign. She had available to her and reviewed the records of the village, including information obtained by the village board prior to concluding that no action by plaintiff resulted in a conflict of interest. Failure to check the information obtained from sources obviously hostile to plaintiff indicates a reckless disregard for whether the statements were false and refutes the conclusion of the majority that there was no reason to suspect the truth of the information which she had obtained.

The managing editor of the defendant newspaper conceded that the procedure followed in deciding to publish the articles did not meet the usual standards of publication. The evidence shows clearly that the editors knew that the "sources" of the unfavorable statements were individuals who were politically opposed to plaintiff. Their failure to check the truthfulness of

the charges was sufficient evidence to support the verdict awarding both compensatory and punitive damages. I am cognizant of the Supreme Court's admonition that a court reviewing a libel judgment must make an independent review of the record. I am equally aware that the question whether defendants acted with reckless disregard of whether the statements contained in the articles were false was for the jury. Our independent review of the record does not authorize us to disregard a conclusion reached by the finder of fact and which is supported by the evidence. I therefore dissent and would reverse the appellate court and reinstate the judgment.

APPENDIX B

STATE OF ILLINOIS
APPELLATE COURT THIRD DISTRICT
OTTAWA

3-84-0736

Wanless v. Rothballer

Modified Opinion Filed October 17, 1985

At a term of the Appellate Court, begun and held at Springfield, on the 1st Day of January in the year of our Lord one thousand nine hundred and eighty-five, within and for the Third District of Illinois:

Present-

HONORABLE FREDERICK S. GREEN, Justice

HONORABLE ALBERT G. WEBBER, III, Justice

HONORABLE DONALD W. MORTHLAND, Justice

DARRYL PRATSCHER, CLERK

BE IT REMEMBERED, that afterwards on August 14, 1985 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following viz: MODIFIED OPINION FILED OCTOBER 17, 1985.

No. 3-84-0736

IN THE APPELLATE COURT
OF ILLINOIS
THIRD DISTRICT

Frank W. Wanless,
Plaintiff-Appellee,

v.

Rhonda Rothballer and The Peoria
Journal Star, Inc.,
Defendants-Appellants.

Appeal from Circuit Court
County of Peoria
No. 77L5147

Honorable Richard E. Eagleton,
Judge Presiding.

OPINION MODIFIED UPON DENIAL OF PETITION FOR REHEARING

JUSTICE GREEN delivered the opinion of the court:

On December 29, 1977, plaintiff filed a complaint in the circuit court of Peoria County against defendants, Rhonda Rothballer and The Peoria Journal Star, Inc. (Journal Star), claiming defamation and seeking compensatory and punitive damages. On April 20, 1983, an amended complaint was filed. On April 2, 1984, after a trial by jury, judgments were entered in favor of plaintiff and against both defendants. Compensatory damages were fixed in the sum of $250,000 each. Punitive damages were awarded in the sums of $1,000 against Rothballer and $249,000 against the Journal Star. Defendants have appealed. We reverse.

The evidence showed that Rothballer was a reporter for the Journal Star and wrote three articles which were published by

that newspaper in its January 20, 1977, edition. Plaintiff was the attorney for the Village of Morton (Village). The articles concerned plaintiff's conduct of his public office as such attorney and centered on his relationship with people who were affected by actions of the governing board of the Village. We have no difficulty upholding the determination, inherent in the judgments, that a least some statements in the articles were false. However, we hold that the evidence was insufficient to support a determination that the articles were published with the "actual malice" required to make tortious a statement made about a public official. *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710.

In addition to contending that the proof of actual malice failed, defendants also contend that (1) plaintiff failed to prove the falsity of the defamatory statements, (2) the trial court erred in refusing to submit to the jury an interrogatory tendered by defendants; and (3) the court erred in instructing the jury. As we will explain, the evidence was sufficient to prove the falsity of certain statements made in the articles. Because of the disposition we make, we need not pass upon defendants' other contentions.

In its opinion in the seminal case of *New York Times,* the Court held that for a statement critical of a public official to be actionable, the statement must be false and made "with knowledge that it was false or with reckless disregard of whether it was false or not." (376 U.S. 254, 280, 11 L. Ed. 2d 686, 706, 84 S. Ct. 710, 726.) Subsequent United States Supreme Court opinions have given at least as limited a definition of the mental state giving rise to actual malice. One opinion stated that the mental state of the publisher of the statement must be such that he, "in fact entertained serious doubts as to the truth" of the statement. (*St. Amant v. Thompson* (1968), 390 U.S. 727, 731, 20 L. Ed. 2d 262, 267, 88 S. Ct. 1323, 1325.) Another opinion stated the publisher must have a "high degre of awareness of *** probable falsity." (*Garrison v. Louisiana* (1964), 379 U.S. 64, 74, 13 L. Ed. 2d 125, 132, 85 S. Ct. 209, .

The opinions in *New York Times* and in virtually all of its progeny have stated that the trier of fact can properly find actual malice only upon proof that is clear and convincing. The posture of the reviewing court is somewhat different than in other cases when passing on the sufficiency of the proof of actual malice. In *New York Times,* the court stated that a reviewing court is required to " 'make an independent examination of the whole record' " to make sure "that the judgment does not constitute a forbidden intrusion on the field of free expreession." (376 U.S. 254, 285, 11 L. Ed. 2d 686, 709, 84 S.. Ct. 710, 729.) The United States Supreme Court explained that doctrine in further detail in *Bose Corp. v. Consumer Union of United States, Inc.* (1984), ____ U.S. ____, 80 L. Ed. 2d 502, 104 S. Ct. . The extent of the stricter scrutiny required is not easily articulated. However, apparently, the reviewing court should give the usual deference to the trier of fact's determination of underlying facts and the veracity and accuracy of witnesses but is to make a more independent determination, from the whole record, as to whether actual malice may be inferred from those underlying facts.

In *Bose Corp.,* the United States Supreme Court held that Federal Rule of Civil Procedure 52(a) (28 U.S.C. §52(a) (1982)) should not be followed by a circuit court of appeals in reviewing the sufficiency of proof of actual malice in a defamation case. That Rule directed a reviewing court not to set aside the findings of fact made in the trial court, unless the findings were "clearly erroneous" and also required deference to the credibility given by the trial court to the witnesses. We are not subject to Rule 52(a), but it is very similar to our usual rule in civil cases whereby the determination of the trier of fact is not to be set aside unless it is contrary to the manifest weight of the evidence, *i.e.,* clearly wrong. (*Village of Wilsonville v. SCA Services, Inc.* (1981), 86 Ill. 2d 1, 426 N.E.2d 824.) The *Bose Corp.* court was applying first amendment principles to a defamation case. Its ruling is as applicable and binding on us as on Federal courts.

Problems of conflict of interest are inherent in the usual situation where an attorney in private practice is also a city or village attorney. The problems are intensified in a municipality of the size of Morton. The newspaper articles in question criticized the manner in which plaintiff handled these problems. In doing so, the articles contained some falsifications, inaccuracies, and exaggerations which could have been avoided with the use of more care. In explaining why we deem the evidence insufficient to support a finding of actual malice, we examine the contents of the various articles and the surrounding circumstances.

One of the articles was headlined "VILLAGE ATTY. WANLESS PAID BY PRIVATE CLIENTS, TAXPAYERS." In its lead sentence, it stated that plaintiff "had been paid twice for preparing annexation papers—by the village and by clients wishing to annex to the village." This was not accurate. Actually, he had been paid by a few clients for preparing annexation papers which were then presented at meetings of the Village Board where he, acting in his capacity as Village attorney, advised the Board as to the sufficiency of the petitions. He also testified that he drafted one petition without charge for a person to whom he owed a favor. No evidence indicated that he charged the Village anything for his time spent on this drafting. he did receive pay for examining the various annexation petitions that were presented to the Board, and he was paid for being present at the meetings where the petitions were presented. Plaintiff testified that when annexation petitions which he had drafted were presented to the Village Board, he did not need to examine them after presentation. Thus, he did not make an additional charge for examining the petitions. He was paid, however, for attending the meetings where the petitions were presented and did give advice to the Village as to whether the petitions were in proper order.

The situation involving a possible conflict of interest was generally described with accuracy. Plaintiff was being paid by the Village and represented it in matters which involved peti-

tions which he had drafted for persons who paid him a fee or for whom he prepared the petition as a return for a favor. An attorney-client relationship developed thereby. Plaintiff was paid both by the taxpayers and his private clients for his work in these proceedings. Rothballer and the Journal Star carelessly described the practice as one whereby plaintiff received the dual pay for preparatin of petitions rather than for his total participation in the matter. Considering the strength of proof necessary to infer actual malice required by *New York Times* and cases following it, we deem the evidence insufficient to support a determination of actual malice. The evidence does not show a reckless disregard for truth nor a high degree of awareness that the statement was probably false.

Other portions of the foregoing article described a proceeding by the Village to construct a sewer and to levy assessments to defray the costs. Among the properties to be affected by the sewer was the Waldheim subdivision which was developed by WRCL Co., a corporation owned by various members of the Zobrist family, one of whom was a Village trustee. The evidence showed that plaintiff had represented this family and, at the time involved in the article, was the registered agent for several corporations owned by them. A hearing was held by the Board at which WRCL Co. was not represented by plaintiff but by a Peoria law firm. Plaintiff represented the Village during this proceeding. WRCL Co. objected to the assessment as did several others. The Waldheim subdivision was then undeveloped. An agreement was reached whereby the Waldheim subdivision would not be assessed, but tax receipts would be used in lieu of assessments from property owned by WRCL Co. Later, when lots were sold and attachments were made to the sewer, each lot owner would be required to pay to the Village a sum equal to a *pro rata* share of what the assessment for the subdivision would have been plus interest.

In describing the background of the sewer project, the article stated:

"At a public hearing in August 1975 for a special assessment sewer project on N. Morton Ave., where Waldheim is located, Wanless said he was the attorney for the subdivision's development company known as WRCL Co.

So, he was representing Trustee Zobrist in his annexation request, as well as representing the village. He also was preparing the special assessment project that would affect his client, Zobrist, and future subdivision dwellers."

Plaintiff had prepared a petition for annexation of a portion of the Waldheim subdivision. Mr. Zobrist had properly abstained from voting on the matter.

The next four paragraphs of the article stated:

"When that project was presented, Trustees Ferguson and Taylor voted against it because they claimed the Waldheim subdivision was receiving preferential treatment.

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With this plan, $20,000 in village tax funds were used to bring the auxiliary trunk line directly to the Waldheim subdivision. There was no cost to developer Zobrist, also a village trustee.

Once that line was furnished, the individual lots were assessed for the remainder of the sewer project costs. The entire sewer system for the subdivision was provided without any cost to WRCL Co."

The evidence indicated that no public hearing was held in August 1975. Plaintiff denied that he ever made a statement at any hearing concerning the sewer project that he represented

WRCL Co., and no contrary evidence was presented. As stated, a Peoria law firm represented WRCL Co. in regard to the sewer project. Rothballer could not remember how she obtained any information indicating that plaintiff had made the statement attributed to him concerning his representation of WRCL Co.

Plaintiff also indicates that he was defamed by the description of how the agreement for reimbursement in lieu of assessment was described in the article. It made no mention of the requirement that the lot owners repay the Village upon purchase of the lot and attachment. In fairness, the reimbursement provision should have been described. However, the article was accurate in the sense that a sewer was brought to the Waldheim subdivision without any expense to the owners. That expense would, nevertheless, have been a charge on the lots sold and would have reduced the amount which the developer could obtain for the lots, but the developer would benefit by not being required to advance any money. Plaintiff argues that the sewer was not brought to the subdivision without charge to them, because lateral sewers had to be installed. The evidence does not bear this out. It indicated that the subdivision bordered on Morton Street, and that the sewer went down Morton Street. The lateral sewers merely made connection with the Morton Street sewer and carried sewer service throughout the subdivision.

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The thesis of the other article was that the value of land belonging to plaintiff's wife had increased because of a "Rezoning Law" which plaintiff had prepared. He had, in fact,

prepared a rezoning ordinance which changed the zoning classification of property his wife had just purchased, but the jury could have concluded that the value of the property had not increased after the rezoning. Plaintiff testified that, in his opinion, there had been no increase. Evidence was also presented that the property was subsequently rezoned to its former classification. Plaintiff also maintains that evidence of a lowering of the assessed valuation of the property indicated that the actual value had not increased. We are not impressed with this argument as assessed valuation of real estate is deemed to have little relevance to the property's actual value. (*City of Chicago v. Harrison-Halsted Building Corp.* (1957), 11 Ill. 2d 431, 439, 143 N.E.2d 40, 45.) Defendants presented the testimony of a real estate appraiser who stated that, in his opinion, the value of the property had increased after the rezoning.

Rothballer testified that she had been told that the value of the property had been increased by (1) Ruth Ferguson, a trustee and member of the minority faction, (2) Rich Karnock, Village Superintendent of Public Works, and (3) Ralph Giancinti, whose property had been denied rezoning. She also testified that she felt that when the number of uses to which a tract of realty could be put is increased, the value of the property would inevitably increase. Plaintiff contends that Rothballer should have checked the assessment of the property and should have had an appraisal made of the property before writing the article. He also contends that she should not have relied upon the opinions of people who would be likely to be biased against him. While a more careful examination as to the value of the property might well have been made, her failure to do so falls far short of inferring actual malice on the part of Rothballer or of the Journal Star.

We also note that the value of property is a matter of opinion. It is doubtful that the statement of an opinion can be deemed to be a falsity. (*Gertz v. Welch* (1974), 418 U.S. 323, 339-40, 41 L. Ed. 2d 789, 805, 94 S. Ct. 2997, .) In any event, the

carelessness which gives rise to an inaccurate opinion is less susceptible to creating an inference of actual malice than carelessness that gives rise to an inaccurate statement of fact.

Plaintiff contends that because defendants were publishing articles about a situation which had existed in the past rather than a "hot" news story, they had ample opportunity to make a full investigation and their failure to do so is a sufficient basis for actual malice. He cites *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975, which was decided after *New York Times*. There, recovery had been obtained for defamation arising from a magazine article charging that the football coach at the University of Georgia had given crucial information to the football coach at the rival University of Alabama enabling the latter school to win an important game between the schools' teams. A majority of the court considered that the conduct of the publisher was sufficiently improper to imply actual malice.

The plurality opinion and the concurrence of Chief Justice Warren noted that the publisher did have time to thoroughly investigate the subject matter of the story but chose to proceed almost entirely upon the affidavit of one person who purported to have overheard a telephone conversation between the two coaches. The publisher had been made aware that the affiant had been convicted of a fraudulent check offense. The writer of the story was not an expert on football and made no attempt to seek expert advice. Expert evidence at trial indicated that the information which the affiant's notes showed to have been exchanged was that which had been readily available from game films usually exchanged or was otherwise valueless.

The other four members of the *Butts* court considered the evidence insufficient to support a finding of malice. The plurality based their determination that the evidence of malice was sufficient on a theory that a lesser showing of malice than that required by *New York Times* was required there because

the plaintiff, Butts, was only a public figure and not a public official. While the present rule may well be that public figures as well as public officials must meet the *New York Times* standard of proof to recover for defamation (see *Gertz v. Welch* (1974), 418 U.S. 323, 336, 41 L. Ed. 2d 789, 803, 94 S. Ct. 2997,), the existence of that rule does nothing to enhance the precedential value of *Butts* to the facts of this case. Of those in *Butts* who held the evidence sufficient to show malice, only Chief Justice Warren applied the standard applicable here. Accordingly, we reject *Butts* as precedent.

In *St. Amant v. Thompson* (1968), 390 U.S. 727, 20 L. Ed. 2d 262, 88 S. Ct. 1323, a political candidate, in making a televised speech,, accused a deputy sheriff of bribery and misfeasance in office entirely upon the basis of an affidavit of an individual of whose veracity the candidate was unaware. The United States Supreme Court held the evidence to fail to support a finding of actual malice. Giving due deference to the determination of the jury, we conclude that the conduct of defendants here was no more indicative of actual malice than that in *St. Amant*.

For the reasons stated, we hold that the proof of actual malice on the part of defendants here did not support the verdict. We reverse the judgments entered on the verdict.

Reversed.

WEBBER and MORTHLAND, JJ., concur.

STATE OF ILLINOIS,
APPELLATE COURT, ss.
THIRD DISTRICT,

As Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in this office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 17th day of October in the year of our Lord one thousand nine hundred and eighty five.

Joseph Hennessy
Clerk of the Appellate Court

APPENDIX C

STATE OF ILLINOIS
APPELLATE COURT THIRD DISTRICT
OTTAWA

3-84-0736

Wanless v. Rothballer

At a term of the Appellate Court, begun and held at Springfield, on the 1st Day of January in the year of our Lord one thousand nine hundred and eighty-five, within and for the Third District of Illinois:

Present-

HONORABLE FREDERICK S. GREEN, Justice

HONORABLE ALBERT G. WEBBER, III, Justice

HONORABLE DONALD W. MORTHLAND, Justice

DARRYL PRATSCHER, CLERK

BE IT REMEMBERED, that afterwards on August 14, 1985 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following viz:

IN THE APPELLATE COURT
OF ILLINOIS
THIRD DISTRICT

No. 3-84-0736

Frank W. Wanless,
Plaintiff-Appellee,

v.

Rhonda Rothballer and The Peoria
Journal Star, Inc.,
Defendants-Appellants.

Appeal from Circuit Court
County of Peoria
No. 77L5147

Honorable Richard E. Eagleton,
Judge Presiding.

JUSTICE GREEN delivered the opinion of the court:

On December 29, 1977, plaintiff filed a complaint in the circuit court of Peoria County against defendants, Rhonda Rothballer and The Peoria Journal Star, Inc. (Journal Star), claiming defamation and seeking compensatory and punitive damages. On April 20, 1983, an amended complaint was filed. On April 2, 1984, after a trial by jury, judgments were entered in favor of plaintiff and against both defendants. Compensatory damages were fixed in the sum of $250,000 each. Punitive damages were awarded in the sums of $1,000 against Rothballer and $249,000 against the Journal Star. Defendants have appealed. We reverse.

The evidence showed that Rothballer was a reporter for the Journal Star and wrote three articles which were published by that newspaper in its January 20, 1977, edition. Plaintiff was the attorney for the Village of Morton (Village). The articles

concerned plaintiff's conduct of his public office as such attorney and centered on his relationship with people who were affected by actions of the governing board of the Village. We have no difficulty upholding the determination, inherent in the judgments, that at least some statements in the articles were false. However, we hold that the evidence was insufficient to support a determination that the articles were published with the "actual malice" required to make tortious a statement made about a public official. *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710.

In addition to contending that the proof of actual malice failed, defendants also contend that (1) plaintiff failed to prove the falsity of the defamatory statements, (2) the trial court erred in refusing to submit to the jury an interrogatory tendered by defendants; and (3) the court erred in instructing the jury. As we will explain, the evidence was sufficient to prove the falsity of certain statements made in the articles. Because of the disposition we make, we need not pass upon defendants' other contentions.

In its opinion in the seminal case of *New York Times,* the Court held that for a statement critical of a public official to be actionable, the statement must be false and made "with knowledge that it was false or with reckless disregard of whether it was false or not." (376 U.S. 254, 280, 11 L. Ed. 2d 686, 706, 84 S. Ct. 710, 726.) Subsequent United States Supreme Court opinions have given at least as limited a definition of the mental state giving rise to actual malice. One opinion stated that the mental state of the publisher of the statement must be such that he, "in fact entertained serious doubts as to the truth" of the statement. (*St. Amant v. Thompson* (1968), 390 U.S. 727, 731, 20 L. Ed. 2d 262, 267, 88 S. Ct. 1323, 1325.) Another opinion stated the publisher must have a "high degree of awareness of *** probable falsity." (*Garrison v. Louisiana* (1964), 379 U.S. 64, 74, 13 L. Ed. 2d 125, 133, 85 S. Ct. 209, 216.) That opinion also indicated that ill will toward the public official by the one

making the statement is insufficient to constitute actual malice. 379 U.S. 64, 74, 13 L. Ed. 2d 125, 132, 85 S. Ct. 209,

The opinions in *New York Times* and in virtually all of its progeny have stated that the trier of fact can properly find actual malice only upon proof that is clear and convincing. The posture of the reviewing court is somewhat different than in other cases when passing on the sufficiency of the proof of actual malice. In *New York Times,* the court stated that a reviewing court is required to " 'make an independent examination of the whole record' " to make sure "that the judgment does not constitute a forbidden intrusion on the field of free expression." (376 U.S. 254, 285, 11 L. Ed. 2d 686, 709, 84 S. Ct. 710, 729.) The United States Supreme Court explained that doctrine in further detail in *Bose Corp. v. Consumer Union of United States, Inc.* (1984), ____ U.S. ____, 80 L. Ed. 2d 502, 104 S. Ct. . The extent of the stricter scrutiny required is not easily articulated. However, apparently, the reviewing court should give the usual deference to the trier of fact's determination of underlying facts and the veracity and accuracy of witnesses but is to make a more independent determination, from the whole record, as to whether actual malice may be inferred from those underlying facts.

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In describing the background of the sewer project, the article stated:

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> So, he was representing Trustee Zobrist in his annexation request, as well as representing the village. He also was preparing the special assessment project that would affect his client, Zobrist, and future subdivision dwellers."

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> Once that line was furnished, the individual lots were assessed for the remainder of the sewer project costs. The entire sewer system for the subdivision was provided without any cost to WRCL Co."

The evidence indicated that no public hearing was held in August 1975. Plaintiff denied that he ever made a statement at

any hearing concerning the sewer project that he represented WRCL Co., and no contrary evidence was presented. As stated, a Peoria law firm represented WRCL Co. in regard to the sewer project. Rothballer could not remember how she obtained any information indicating that plaintiff had made the statement attributed to him concerning his representation of WRCL Co.

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We also note that the value of property is a matter of opinion. It is doubtful that the statement of an opinion can be deemed to be a falsity. (*Gertz v. Welch* (1974), 418 U.S. 323, 339-40, 41 L.

Ed. 2d 789, 805, 94 S. Ct. 2997, .) In any event, the carelessness which gives rise to an inaccurate opinion is less susceptible to creating an inference of actual malice than carelessness that gives rise to an inaccurate statement of fact.

Plaintiff contends that because defendants were publishing articles about a situation which had existed in the past rather than a "hot" news story, they had ample opportunity to make a full investigation and their failure to do so is a sufficient basis for actual malice. He cites *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975, which was decided after *New York Times*. There, recovery had been obtained for defamation arising from a magazine article charging that the football coach at the University of Georgia had given crucial information to the football coach at the rival University of Alabama enabling the latter school to win an important game between the schools' teams. A majority of the court considered that the conduct of the publisher was sufficiently improper to imply actual malice.

The plurality opinion and the concurrence of Chief Justice Warren noted that the publisher did have time to thoroughly investigate the subject matter of the story but chose to proceed almost entirely upon the affidavit of one person who purported to have overheard a telephone conversation between the two coaches. The publisher had been made aware that the affiant had been convicted of a fraudulent check offense. The writer of the story was not an expert on football and made no attempt to seek expert advice. Expert evidence at trial indicated that the information which the affiant's notes showed to have been exchanged was that which had been readily available from game films usually exchanged or was otherwise valueless.

The plurality opinion, although agreeing that proof of actual malice was necessary for recovery, deemed that, because the plaintiff was merely a public figure rather than a public official, a lesser proof of actual malice was necessary. The stated reason

for the difference was because if the person defamed was not a public official, allowing recovery would not be taken as a "vindication of governmental policy" criticized in the defamatory statement. (388 U.S. 130, 154, 18 L. Ed. 2d 1094, 1110, 87 S. Ct. 1975, 1991.) The court concluded that, accordingly, although proof of "actual malice" was necessary to not discourage full discourse on the conduct of important persons, "the rigorous federal requirements" set forth in *New York Times* did not have to be applied. 388 U.S. 130, 155, 18 L. Ed. 2d 1094, 1111, 87 S. Ct. 1975, 1991.

Here, the plaintiff was a public official. Permitting recovery by plaintiff might well be taken as a "vindication of governmental policy" about which the accurate aspects of the articles have raised substantial concern. The "rigorous federal requirements" of *New York Times* and its progeny must be applied. In *St. Amant v. Thompson* (1968), 390 U.S. 727, 20 L. Ed. 2d 262, 88 S. Ct. 1323, a political candidate, in making a televised speech, accused a deputy sheriff of bribery and misfeasance in office entirely upon the basis of an affidavit of an individual of whose veracity the candidate was unaware. The United States Supreme Court held the evidence to fail to support a finding of actual malice. Giving due deference to the determination of the jury, we conclude that the conduct of defendants here was no more indicative of actual malice than that in *St. Amant*.

For the reasons stated, we hold that the proof of actual malice on the part of defendants here did not support the verdict. We reverse the judgments entered on the verdict.

Reversed.

WEBBER and MORTHLAND, JJ., concur.

APPENDIX D

STATE OF ILLINOIS
APPELLATE COURT THIRD DISTRICT
OTTAWA

81-139

At a term of the Appellate Court, begun and held at Springfield, on the 1st Day of January in the year of our Lord one thousand nine hundred and eighty-one, within and for the Third District of Illinois:

Present-

HONORABLE FREDERICK S. GREEN, Presiding Judge

HONORABLE JAMES T. LONDRIGAN, Justice

HONORABLE ALBERT G. WEBBER, III, Justice

JULEANN HORNYAK, Clerk

BE IT REMEMBERED, that afterwards on May 12, 1982 the Order of the Court was filed in the Clerk's Office of said Court, in the words and figures following viz:

No. 81-139

IN THE APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

Frank M. Wanless,
Plaintiff-Appellant,

vs.

Rhonda Rothballer and The Peoria Journal Star, Inc.,
Defendants-Appellees.

Appeal from Circuit Court
Peoria County
No. 77-L-5147

Honorable Robert E. Hunt,
Judge Presiding.

RULE 23 ORDER

Plaintiff filed his four-count complaint on December 28, 1977. Counts I and II allege that plaintiff was libeled by defendant Rothballer, a newspaper reporter. Counts III and IV allege that plaintiff was libeled by Rothballer's employer, the Peoria Journal Star. The alleged libelous statements were contained in a series of articles published in the Journal Star in 1977.

Each count of plaintiff's complaint contained an identical paragraph 8. Paragraph 8 included 15 subparagraphs which allege that specific aspects of the statements are libelous. On December 18, 1980, defendants filed a motion for partial summary judgment as to subparagraphs 8(a), 8(b), 8(e) and 8(k). These particular subparagraphs of plaintiff's complaint are set forth below:

> "(a) that plaintiff had been twice paid for preparing annexation papers — by the Village of Morton and by clients wishing to annex to the Village;

(b) that plaintiff was guilty of conflict of interest in preparing required annexation papers for one Fred Schmidgall***.

* * *

(e) that it was stated plaintiff had been guilty of a conflict of interest in representing opposite sides in controversies between the Village of Morton and unknown or unnamed parties;

* * *

(k) that the article stated plaintiff was in a conflict of interest in preparing a rezoning ordinance which involved his wife's property."

The trial court granted the motion on January 21, 1981. Plaintiff filed a motion to reconsider, which was denied on February 20, 1981. The trial court's order confirmed the grant of a partial summary judgment and found that there was no just reason to delay the appeal. Plaintiff then orally moved to dismiss the remainder of his complaint without prejudice pursuant to section 52 of the Civil Practice Act (Ill. Rev. Stat. 1979, ch. 110, par. 52). The trial court granted the motion.

The sole issue before this court on appeal is whether the trial court properly granted defendant's motion for summary judgment. Defendants contend that the grant of summary judgment was proper for any of the following three reasons: (1) the statements made were capable of an innocent construction; (2) the statements made were true as a matter of law; and (3) the statements made were not, as a matter of law, made with actual malice.

The innocent construction rule provides that the allegedly defamatory article must be read as a whole and that words are to be given their natural and obvious meanings. The words

which are alleged to be libelous must be given an innocent construction where such a construction is possible. Words which can be innocently construed are to be declared nonactionable as a matter of law. *John v. Tribune* (1962), 24 Ill. 2d 437, 442, 181 N.E.2d 105, 108.

The statements made in the present case are not capable of innocent construction. Subparagraph (a) clearly states plaintiff was paid twice for doing the same work. There is nothing in the remainder of the article to suggest any other interpretation of this statement.

Subparagraphs (b), (e), and (k) alleged defendant stated plaintiff was guilty of a conflict of interest. Although the articles never state directly that plaintiff was guilty of a conflict of interest, read as a whole they do clearly charge plaintiff with such a conflict. Defendants assert the articles leave it up to the readers to draw their own conclusions. But, given the presentation of facts by defendants, the readers are left with no alternative. It is not necessary to state directly that plaintiff was guilty of a conflict. Imputation is enough. See *Dombrowski v. Shore Galleries, Inc.* (1978), 59 Ill. App. 3d 237, 376 N.E.2d 45; *Spanel v. Pegler,* (7th Cir. 1947), 160 F.2d 619.

None of the statements can be said to be true as a matter of law. There is no direct evidence that plaintiff was paid twice for doing the same work. Contrary to defendants' assertion, plaintiff did not state it was his duty to examine and approve all legal documents submitted to the village. Rather, plaintiff stated the board did not ask for his recommendation for approval on annexation papers he prepared. It cannot be said plaintiff was paid under the standing remuneration agreement as if he gave such a recommendation since he stated that if he worked less than 60 hours a month, he credited the village for the difference.

The statements imputing that plaintiff was guilty of a conflict of interest, as alleged in subparagraphs (b), (e), and (k) of

paragraph 8 of the complaint, do not support the grant of summary judgment. Although the basic facts do not seem to be in dispute, whether those facts constitute a conflict of interest on plaintiff's part is a question of fact (cf. *Welch v. Chicago Tribune Co.* (1975), 34 Ill. App. 3d 1046, 340 N.E.2d 539.) In *Welch,* the First District found that the issue of whether plaintiff was an alcoholic was an issue of fact that should have been submitted to a jury. The court held this despite the fact that plaintiff admitted consuming 14 to 18 bottles of beer a day. In the case at bar, the question of whether plaintiff was engaged in a conflict of interest was a jury question; summary judgment on that basis was inappropriate.

Plaintiff and defendant agree that plaintiff must show actual malice, as defined in *New York Times v. Sullivan* (1964), 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710, on defendants' part in order to recover damages for libel. Actual malice, as defined in *Sullivan,* is "with knowledge that it [the statement] was false or with reckless disregard of whether it was false or not." (376 U.S. 254, 279-80, 11 L. Ed. 2d 686, 706, 84 S. Ct. 710, 726.) In order to show reckless disregard on the part of defendants, plaintiff must present sufficient evidence for the trier of fact to conclude that defendants "in fact entertained serious doubts as to the truth" of their publication (*St. Amant v. Thompson* (1968), 390 U.S. 727, 731, 20 L. Ed. 2d 262, 267, 88 S. Ct. 1323, 1325, or had a "high degree of awareness of *** probable falsity." *Garrison v. Louisiana* (1964), 379 U.S. 64, 74, 13 L. Ed. 2d 125, 133, 85 S. Ct. 209, 216.

Plaintiff has shown avenues of investigation not pursued by defendants. Plaintiff alleges that the defendants failed to investigate and interview Fred Schmidgall whose annexation case was part of the alleged conflict of interest. Plaintiff also alleges that the defendants failed to check the status of a complaint filed against plaintiff with the Disciplinary Commission relating to these charges, which complaint was known to defendants. These omissions may well be excusable; however, the issue of

whether the facts and circumstances of this case disclose a reckless disregard for the truth is not so free from doubt that an answer can be said to exist as a matter of law. The inaccurate statements made by defendants that plaintiff represented parties before the village board and was paid twice for the same work lend additional support to this conclusion.

We make no decision regarding the ultimate issue of whether plaintiff may recover from defendants. We merely hold that the factual questions heretofore outlined are for the jury to answer. The order granting summary judgment for defendant on subparagrahs (a), (b), (e), and (k) of paragraph 8 of each count of plaintiff's complaint is reversed and the cause is remanded to the circuit court of Peoria County for further proceedings consistent with the views expressed herein.

Reversed and remanded.

Order drafted by LONDRIGAN, J.,
concurred in by WEBBER, J., and
GREEN, P.J., dissenting in part and
concurring in part.

Mr. PRESIDING JUSTICE GREEN, dissenting in part and concurring in part:

I deem the information properly before the trial court to have shown, as a matter of law, that defendants did not act with malice in making the statements imputing to plaintiff a conflict of interest as alleged in subparagraphs (b), (e), and (k). No evidence indicated the statements were known by defendants to be false. Defendant Rothballer was shown to have made an extensive investigation of the question of whether plaintiff's activities created a conflict of interest. Evidence that she failed to make inquiry of the Disciplinary Commission or of Fred Schmidgall falls far short of establishing any basis for a factual determination that she acted with reckless disregard for the truth. The summary judgment for defendants should be affirmed in respect to the allegations of those subparagraphs.

For the reasons stated by the majority, I agree that the summary judgment should be reversed as to the allegations of subparagraph (a).

APPENDIX E

A-10 JOURNAL STAR, Peoria, Thursday, January 20, 1977

Annexing To Morton . . . *Village Atty. Wanless Paid By Private Clients, Taxpayers*

By Rhonda Rothballer

MORTON — Village Atty. Frank M. Wanless has been paid twice for preparing annexation papers — by the village and by clients wishing to annex to the village.

He has presented annexation petitions for his clients while acting as the board attorney.

Last Of A Series

A public official has a conflict of interest when he could personally benefit financially by a governmental action, which he could directly or indirectly influence.

Former Tazewell County State's Atty. C. Brent Bode said he repeatedly told Wanless to stop this practice, but the policy went unchanged. Last February the Village Board reaffirmed the village's annexation procedure, permitting Wanless' dual representation.

At Monday's Village Board meeting, Wanless said he has stopped representing both sides in annexation cases. He said he never thought there was a conflict of interest in the board's policy.

Because of the controversy, however, he said he decided not to represent individuals wishing to annex to the village.

He made this decision "at least six months ago," but decided to announce it publicly Monday.

Six months ago would have been last July, when he represented Fred Schmidgall who wished to annex to the village. Schmidgall lives on N. Morton Ave., and his annexation fee was established by the village.

Six months ago would have also been five months after the controversy was quieted by the board's reapproval of the annexation procedure.

During the interim from July to January, there has been only one annexation request. That was from Schrock Builders in October, and the firm's attorney represented the company in its petition.

Wanless hasn't represented any individuals petitioning for annexation during the past five months. But there haven't been any such requests before the board.

Wanless' dual involvement was questioned last July by Trustee Ruth Ferguson. He replied that he was a private lawyer as well as the village attorney.

"I have to make a living, too," he said.

The village ordinance still permits the policy of the village attorney representing both sides during annexation cases.

Mayor Eugene Mathis supported the practice in September. And Wanless said he supported the policy when questioned about it Oct. 20.

Mayor Eugene Mathis said Wanless prepares annexation papers when the matter "is all cut and dried and the board has set up annexation fees in certain areas." For example, anyone living along N. Morton Ave. could annex to the village for a $1,200 fee.

"Frank (Wanless) will prepare the annexation papers for these people," Mathis said. Those individuals will also pay Wanless for his services. He determines the fee, which is usually about $80.

In cases where persons petition the board for annexation and a fee has yet to be set, Wanless will not represent the individuals, Mathis said.

"When all the rules of annexation are laid down," Wanless said he does the legal work. "We have a policy, for the most part, that the village annexes property only contiguous to the village with the terms the board sets down by ordinance.

"I've always declined when a matter wasn't set . . . But, otherwise, oh, why not? If they want me to prepare it, I would do it," Wanless said.

Former State's Atty. Bode said he didn't take any action against Wanless because he didn't consider his dual legal service a criminal act.

"It is legally, ethically improper to represent both sides of any controversy or contract, especially by a public attorney, employed by the public, the taxpayers," he said.

"It's a simple conflict. The simple man on the street can see that." Bode said even when there is only an appearance of impropriety, the action should be avoided.

"I've made no secret of it. Some of the transactions at least had the appearance of impropriety. I, personally, think he should avoid such a thing," Bode said.

He requested a formal opinion from Illinois Atty. Gen. William J. Scott about this annexation method. But, before it was finished, Bode left his office to new State's Atty. Bruce Black.

Black must now decide if he wants the opinion completed and released.

Besides the ethical reasons, Bode said Wanless could misuse his authority.

Charges alleging conflicts of interest and other related practices have been swirling about the Morton Village Board recently. This is the last of a series of articles looking into the allegations in some detail.

"He could harass someone who wants to do something. He can bog them down in red tape. Someone else, one of the 'in crowd,' could get by without requiring all sorts of things of him. In local government, favoritism runs rampant," Bode said.

Because Wanless knows all the village laws and codes, any other attorney would take more time checking the necessary information to prepare an annexation petition, Mathis said.

Disputing Mathis' reasoning, Wanless said it's easy for attorneys to prepare annexation papers.

"I've prepared papers for other communities. You just check the peculiarities of the codes. It's not a major task; most any attorney can do it," he said.

Tazewell County State's Atty. Black said he considers it unethical to represent both sides in any legal matter. Using a divorce analogy, he said he would not represent both persons even in an uncontested divorce.

"A lawyer shall not accept private employment in a matter in which he had (has) substantial responsibility while he was (is) a public employe," according to Canon 9 of the Code of Professional Responsibility and the Professional Ethics Opinions of the Illinois State Bar Association.

Wanless is considered a public official while representing the village and annexation involves the village's legal rights and obligations.

OTHER professional ethics opinions reiterate Canon 9. ISBA Opinion 280 cites Canon 4 which "prohibits the lawyer in public employment, among other things, from accepting representation of a person or corporation who seeks favorable consideration on any matter pending before the public body by which he is employed."

Wanless doesn't view his action as a conflict of interest. His definition of a conflict of interest is any proposal that "wasn't in harmony with what the village wanted to be done." As long as plans correspond with the village's best interest, then there could be no conflict, he said.

By that interpretation, he would view the annexation of certain properties as a desirable thing. Therefore, he wouldn't consider himself in conflict.

However, his definition is contrary to all known principles of law, according to Ludwig Kolman of the Better Government Association legal staff in Chicago.

Trustee Ruth Ferguson, who is an announced candidate for mayor, researched the village's annexation procedure and claimed it was a financial hardship to potential residents and caused a conflict of interest for Wanless.

She recommended last Feb. 2 that the village attorney continue to prepare annexation petitions, but at no cost to the annexing party. The homeowner annexing would still pay annexing fees to the village, but not to Wanless.

Those annexing would also pay for the required certified plat, as they do now, according to her proposal.

When persons ask Washington Atty. Kenneth Black to represent them in annexation proceedings, he usually tells them to hire another attorney.

If the offer is too lucrative to pass up, he could ask the City Council to temporarily use another attorney so he can represent the individuals. As a result, he doesn't represent both the city and the annexing petitioners.

MANY CITIES pay the attorneys' fees connected with annexation because of the anticipated tax revenue from the additional residents.

"The village board policy of permitting the village attorney to prepare the necessary papers in annexation at the expense of the property owners saves the taxpayers the expense," Wanless recently wrote in the local Morton paper.

"The annexation charge long ago established by the village board is a unique attempt to equalize the cost of water and sewer department between Morton taxpayers who are continually paying and the annexing property owner who gets the immediate benefit of the system," Wanless wrote.

At the board meeting after Mrs. Ferguson's proposal, Trustee Lee Hinners proposed that no changes be made in the village's annexation procedure.

Trustee Lloyd C. "Bud" Zobrist seconded the motion, and the board reaffirmed the village's annexation procedure. Only Trustee Ferguson voted against it.

Trustee Jack Taylor, who had supported Mrs. Ferguson's proposal, was absent from that meeting.

After that, the very next month was a petition to annex a portion of Waldheim subdivision to the village. It is one of Zobrist's developments.

Zobrist abstained from the vote as the board approved the request.

At a public hearing in August 1975 for a special assessment sewer project on N. Morton Ave., where Waldheim is located, Wanless said he was the attorney for the subdivision's development company known as WRCL Co.

So, he was representing Trustee Zobrist in his annexation request, as well as representing the village. He also was preparing the special assessment project that would affect his client, Zobrist, and future subdivision dwellers.

When that project was presented, Trustees Ferguson and Taylor voted against it because they claimed the Waldheim subdivision was receiving preferential treatment.

Other subdivision developers had to pay to bring their pipeline to the village's trunk line. Sally E. Ackerman, developer of Hyde Park Subdivision north of Waldheim, here that expense himself.

With this plan, $80,000 in village tax funds were used to bring the auxiliary trunk line directly to the Waldheim subdivision. There was no cost to developer Zobrist, also a village trustee.

Once that line was furnished, the individual lots were assessed for the remainder of the sewer project costs. The entire sewer system for the subdivision was provided without any cost to WRCL Co.

Additionally, the engineering firm for the subdivision, sewer assessment project and village with Kingdon & Naven.

Zobrist's relationship with Wanless can be noted as far back as 1968, when Wanless was the registered agent for the Country Aire Club. Zobrist and four other members of his family were listed as directors of the not-for-profit, private recreational center.

Wanless was also the registered agent in 1968 for the Field Corp., which directs the Field Shopping Center, another Zobrist development.

Wife's Land Value Benefits From Wanless-Prepared Rezoning Law

MORTON — A rezoning ordinance prepared by Village Atty. Frank M. Wanless in 1972 multiplied the value of 36 acres of land belonging to his wife.

The land, adjacent to Grundy School here, is being purchased by Lonnie Wanless on a contract for deed basis.

Wanless

She agreed to buy the land, then zoned single-family residential on Oct. 30, 1972. A public hearing to "update the village map" was conducted on Nov. 27, 1972, on changing her land to multiple-family residential.

The Village Board approved this change, along with 12 other rezoning classifications on Dec. 4, 1972.

Ray Litwiller, of Columbia, Mo., who still holds the deed for the Wanless property, said he knew the land was to be rezoned when he sold it to Mrs. Wanless. He would not discuss the transaction further.

With little discussion at the public hearing, the Planning Commission recommended the 14 parcels of land included in the ordinance be rezoned.

Some zoning classifications were new and others were aligned to comply with rezoning already approved by the board since the publication of previous zoning maps.

Former Tazewell County State's Atty. C. Brett Bode investigated the ordinance and said he could not find "any criminal violation.

"It is legally, ethically improper to represent both sides of any controversy or contract, especially by a public attorney, employed by the public, the taxpayers," he said.

Bode told Wanless to stop representing both the village and clients in the same governmental matter. This is especially so when his wife is involved, Bode said.

Defending his preparation of the ordinance, Wanless wrote: "Mrs. Wanless is her own free agent.

"She certainly has as much right as anyone, . . . to buy and own property in Morton. In fact she does and has for many years owned property in her own name.

"Because I was attorney for the village, she should have been neither favored nor penalized. She had contractural interest in the land, not I," Wanless wrote.

To be certain his wife wouldn't be "favored nor penalized" by his position, Wanless could have asked that another attorney prepare the ordinance.

"Was this (the rezoning) in the best interest of the taxpayers of Morton or the best interest of Mr. Frank Wanless?" Trustee Rush Ferguson asked at a public meeting.

Canon 5 of the Illinois Code of Professional Responsibility states that a lawyer's professional judgment should be exercised "free of compromising influences and loyalties."

Lawyers who serve as public officials "should not engage in activities in which his personal or professional interests are or . . . may be in conflict with his official duties," according to Canon 8 of the Code.

Other parcels of land rezoned with the passage of the ordinance include two tracts owned by William Roecker, secretary of the Planning Commission.

Former Village Board members William M. Miller and Ervin Kahler also had land reclassified with the board action. Two parcels are listed with "owners unknown" in the Tazewell County Recorder of Deeds Office.

Usually rezoning petitions are presented by the individuals requesting the change. They submit a legal description of the property to be rezoned and pay a $75 fee.

This is a common procedure followed in surrounding communities, although the fee may vary.

THERE WAS no such rezoning petition, legal description or fee paid for reclassifying the Wanless property, or other parcels rezoned with it.

That is because the village initiated the change, not at the request of Mrs. Wanless or anyone else, Bode said. Municipalities can and do rezone property to adhere to the community's comprehensive master plan.

There is no record as to who proposed this change and to what plan it had to conform.

Apartments could be built on the Wanless tract, but there has been no development there in four years.

Village trustees have rezoned privately owned property in the past without a direct notice to the owner, such as a registered letter.

Publishing legal notices on public hearings about proposed rezonings satisfies the law, Bode said.

During the public hearing on Nov. 28, 1972, no names of property owners were given and only three common addresses were given. The other 11 parcels were described with legal terms.

No adjacent property owners were notified of the proposed to rezone property.

In Washington, names of property owners requesting rezoning and common addresses of such properties are published in the newspaper legal notice.

Property owners in Peoria living within 300 feet of property to be rezoned are notified of those requests before public hearings.

Wanless Earned More Than Peoria Attorney Last Year

MORTON — Part-time Morton Village Atty. Frank M. Wanless earned about $1,500 more last year than full-time Peoria City Corp. Counsel Jack B. Tepitz.

Wanless serves a village with almost 14,000 residents, while Tepitz serves a city with 130,000 residents.

Part of Wanless' fee, however, must pay for his office overhead and supplies. Tepitz works out of City Hall, where such things are provided.

But Wanless is able to augment his income through his regular law practice, which he maintains in addition to his village service.

During fiscal year 1971, Wanless earned $24,823, while Tepitz is salaried at $23,340. Wanless' retainer, $1,500 per month, would have garnered him $18,000.

He charges $30 for work over his 60 hours paid for with the retainer each month. Last year that amounted to 360 hours more than the 720 hours provided through retainer fees.

Broken down further, this shows an average of 48 hours per month more than the 60 monthly hours paid for with the retainer.

Each month Wanless attends two board meetings, which take about six hours combined. The remaining 108 hours for which he is paid are not itemized for the board. He submits the bill listing the hours he's worked, and he is paid that amount.

He attributes the large amount of time to walk-in complaints. His wife, who is his secretary, said "We get every dog case in town."

Although he said he keeps a precise listing of time spent on village business, he doesn't provide those detailed records to the board.

The board doesn't ask for more than a rough accounting of his time, so that's all he provides, he said.

For example, his "rough account" for April 1970 to September 1970 read: "Legal services rendered in April 1970 to September 1970 in excess of the 60 hours per month covered by retainer fee: 222 at $30 per hour — $6,660."

A one-page statement last Feb. 8 briefly outlined legal work for a Circuit Court case. It amounted to 134½ hours of work, costing $3,488.

In Washington, with a 9,500 population, $11,737 was spent in lawyers' fees during the last fiscal year. That is one-third the amount paid in Morton.

In Pekin, more than twice the size of Morton with 32,315 residents, $36,747 was spent during the last fiscal year for legal expenses. That is about $5,000 more than spent in Morton.

There the city attorney received $19,125; his assistants, $13,875, and contractural expenses were $4,747. Pekin obviously has a more specific accounting system to break down how and where the legal budget is spent.

An itemized list of Morton's legal expenses would allow the board to see how its funds are expended.

"I don't go looking for work to do," Wanless said. Serving at the board's discretion, he said he only does work requested and required by the board.

No. 86-1740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FRANK M. WANLESS,
Petitioner,

vs.

RHONDA ROTHBALLER and THE PEORIA JOURNAL STAR, INC.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

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Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

STATEMENT OF THE CASE

Rhonda Rothballer, a reporter for The Peoria Journal Star, was asked by her supervisor to look into the controversy in the Village of Morton regarding alleged conflicts of interest which he had read about in the Tazewell County News. During the course of her investigation Rothballer interviewed the petitioner, Frank Wanless; Brett Bode, Tazewell County State's Attorney; Bode's successor, State's Attorney Bruce Black; Eugene Mathis, Mayor of the Village of Morton; Alfred Heininger, former Village Mayor; Village of Morton Trustees, Lee Hinnen, Bud Zobrist, Henry Grim, Jack Taylor and Ruth Ferguson; Morton Village Clerk, William Klopfenstein; William Roecker, Village of Morton Planning Commission; Morton attorney, An-

thony Corsentino; Ken Black, Attorney for the City of Washington, Illinois; Ludwig Kohlman, Attorney for the Better Government Association; Morton landowners Ray Litwiller and Ralph Giancinti; various clerks in the Attorney General's office, the Illinois State Bar Association office, the Tazewell County Clerk's office and the Morton Village Hall. Upon completion of her investigation Rothballer wrote the articles in question which were published on January 20, 1977. The petitioner did not contact anyone at The Peoria Journal Star prior to filing suit for libel on December 29, 1977.

At trial the petitioner admitted that he prepared annexation papers for persons who wanted to annex to the village and that he charged those persons a fee for this service. He also admitted that it was his official duty as village attorney to attend Village Board meetings and to examine and approve all legal documents presented to the Board. The Village Board would not act on any document unless the petitioner gave his approval. The petitioner was paid by the village to perform these legal services. Rothballer thought that petitioner's examination of annexation documents which he had prepared was a part of the service involved in preparing them and since he was also paid by the village for performing this service she concluded that petitioner was paid twice for the preparation of annexation papers.

When Rothballer requested copies of petitioner's legal bills from the Village Clerk she was given non-itemized statements. The petitioner testified that he submitted non-itemized time bills to the village but detailed time reports to Trustee Lee Hinnen, whose job it was to approve his bills. Mr. Hinnen identified certain itemized statements at trial which he said were typical of petitioner's bills to him.

The petitioner prepared a rezoning ordinance for the Village of Morton which included 35 acres of land owned by his wife whereby his wife's land was rezoned from R-1, single family, to R-3, multiple family. According to the petitioner this was done in a periodic rezoning to bring the zoning map up-to-date. The

petitioner testified that he did not believe there was any change in the value of the land by the rezoning but there was really no way you could tell. Ruth Ferguson, Village Trustee; Rich Karnock, Superintendent of Public Works and Ralph Giancinti, a land developer, told Rothballer the rezoning increased the value of the land. Rothballer thought it was common knowledge that a rezoning which increased the potential use of land increased the value of the land. One year after petitioner was no longer Village Attorney his wife's 35 acres of land was rezoned back to R-1.

Lloyd "Bud" Zobrist, Village Trustee, was a land developer and part owner of Waldheim subdivision through a partnership known as WRCL. He did not testify at trial although he was the managing partner. The petitioner had a relationship as attorney for the Zobrist family dating back to the 1950's and was the registered agent for several Zobrist corporations. Another land developer, Solly Ackerman, complained to Village Trustees Ferguson and Taylor that the village extended the sewer line to the subdivision being developed by Trustee Zobrist without charge but he had to pay to have the sewer line extended to his subdivision. Trustee Taylor testified that the city expended funds to extend the sewer line to the WRCL development which he did not believe to be the normal procedure. Trustee Ferguson testified that the village used $20,000 in public money to bring the trunk line to the Waldheim Subdivision being developed by WRCL Co. According to her investigation Solly Ackerman had to pay that expense himself as a developer.

Ordinance No. 667, prepared by petitioner, removed Waldheim Subdivision and three or four parcels of farmland from the sewer assessment roll and provided instead for a sewer connection fee. This fee was payable when a lot owner hooked up to the sewer or when the Village Board accepted certification by its engineer that the lot was available to be served by the sewer. There was no evidence that WRCL ever paid any sewer connection fee prior to the time that the article in question was published. The conclusion of Rothballer that the sewer system

was provided without cost to WRCL Co. was based on the fact that the trunk line was built with public funds and on the deferred aspect of the sewer connection fee which allowed it to be passed on to the buyer of the lots.

With respect to the issue of conflict of interest, the petitioner told Rothballer that his definition of a conflict of interest was any proposal that wasn't in harmony with what the village wanted done. Trustee Taylor testified that petitioner had the practice of representing private individuals before the City Planning Commission or the Village Board for which he was the attorney. He discussed this particular activity with the petitioner privately and was informed that it had been approved by the Board. Three members of the Village Board also served on the Planning Commission. Trustee Ferguson testified that she objected to the Village Attorney representing a person coming to the village to annex or do business with the village. She tried to get the Village Board to change this procedure but was not successful.

Under the law of the case, pursuant to the first opinion of the Third District Appellate Court upon appeal from a summary judgment for the respondents, the issue as to whether petitioner's conduct amounted to a conflict of interest was a question of fact for the jury. App. at A-50. At trial Brett Bode and Bruce Black, State's Attorneys for Tazewell County; Jack Teplitz, former Corporation Counsel for the City of Peoria; Howard Braverman, General Counsel for the Illinois State Bar Association; Ludwig Kohlman, attorney for the Better Government Association and Anthony Corsentino, attorney residing in the Village of Morton, all testified that in their opinion the conduct of petitioner amounted to a conflict of interest. The petitioner and Harold Kuhfuss, former attorney for the City of Pekin, testified that it was not.

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* Pursuant to Supreme Court Rule 28.1, please be advised that The Peoria Journal Star, Inc. has no parent corporation. It owns all of the stock of PJS Publication, Inc. and approximately 13 percent of the stock of Peoria Development Corporation.

ARGUMENT

The petitioner wants the Court to accept this case for review, declare the doctrine of independent *de novo* review unconstitutional and adopt a set of rules which will guide lower courts and litigants to a proper and more consistent application of the law to the facts. The respondents respectfully submit that this Court should not reverse itself and declare two decades of its rule making unconstitutional. Nor should this Court consider abdicating or renouncing the right and duty of courts of review to examine the matters in dispute and independently decide whether First Amendment rights have been honored or violated. *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Garrison v. Louisiana,* 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964); *St. Amant v. Thompson,* 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968); *Bose v. Consumer's Union of the United States, Inc.,* 692 F.2d 189 (1st Cir. 1982), *aff'd.* 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), *rehearing denied,* 467 U.S. 1267, 104 S.Ct. 3561, 82 L.Ed.2d 863 (1984).

Both the Illinois Appellate Court and the Illinois Supreme Court carefully followed the mandate of this Court as set forth in the above cases. Both Illinois courts recognized that they could not invade the province of the jury and consider the demeanor or credibility of the witnesses or reach decisions contrary to that of the jury as to historical or discrete facts. Because of that extreme deference to the *presumed* findings of fact by the jury, the Illinois courts did not even consider the substantial showing of truth presented by the respondents on the matters in dispute.

Petitioner asserts that neither of the Illinois courts of review challenged the adequacy or correctness of the instructions given to the jury and questions whether an independent *de novo* review is even necessary when the jury has been properly instructed on the issues. If this statement is meant to imply that either court examined or approved the instructions to the jury

the implication is false. Respondents tendered a special interrogatory to be answered by the jury regarding Rothballer's subjective awareness of falsity which was refused. The respondents also tendered four instructions defining the term "reckless disregard" to differentiate it from the common understanding of the phrase "reckless conduct". These instructions were also refused. Neither of the Illinois courts of review found it necessary to consider these rulings of the trial court since eight of the nine justices agreed that the evidence of actual malice was not clear and convincing.

The evidence which petitioner relied on as proof of actual malice is that the reporter was inexperienced; she relied on information furnished by two minority members of the Village Board who disagreed with the petitioner; the petitioner was not informed of the matters to be published in advance; the editor decided to publish without considering whether the articles were true or false and the decision to publish was made in a two-minute conference which did not comport with the usual standards of journalism.[1] Both the Illinois Appellate Court and the Illinois Supreme Court agreed that this evidence of actual malice was not clear and convincing. In his lone dissent Justice Goldenhersh opined that Rothballer was guilty of actual malice in failing to check information obtained from sources opposed to petitioner in a heated political campaign. App. at A-19. Respondents respectfully submit that any such rule as this would substantially reduce if not squelch the flow of information available to the electorate during a political campaign in violation of the First Amendment.

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[1] The unqualified statement that the decision to make the publication in question was made in a two-minute conference which did not comport with the usual standards of journalism is another example of the extreme deference by the Illinois courts of review to the fact-finding function of the jury. The following is a verbatim transcript of the testimony on this point which puts the statement in context:

Petitioner's argument that respondents were guilty of actual malice in publishing the views of the minority trustees regarding matters of public interest without first consulting neutral sources to verify their conclusions is similar to that of Justice Goldenhersh. Factually, it assumes that there is such a thing as a neutral source; that the neutral source is in a position to know and is informed; that the source has an opinion on the matter and that the conclusion of the source is completely objective. Any such person or source would be very difficult to find. Respondents submit that such an obligation on the press before publishing is patently unconstitutional in addition to being an insurmountable burden. St. Amant was not guilty of reckless disregard for the truth in relying on information supplied by just one informant who was a member of a dissident group which was engaged in an internal power struggle in the union to which he belonged. *St. Amant v. Thompson,* 390 U.S. 727, 733, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). Further, petitioner's reliance on *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 789 (1967) for the duty to verify information is misplaced for many reasons, including the obvious dissimilarity of the sources of information. Respondents' sources were not only numerous, they were also in a position to know the facts.

The Petition for Writ of Certiorari does not show any special or important reason for granting certiorari as required by Supreme Court Rule 17.1. There is no need for further guidance in order for lower courts to properly conduct an in-

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Q Do they run stories — which could do damage to the person being written about on the two-minute interview to decide whether it should be published? Is that the usual standard of journalism?

A Well, there was a great deal more that went into it than a two-minute discussion.

Q Sir, would you answer my question?

A That is not the usual standard of journalism.

dependent *de novo* review of the evidence relevant to the issue of actual malice without violating the Seventh Amendment to the Constitution of the United States. The law is already manifestly clear that in public official libel cases the fact finder decides the questions of historical or discrete facts. Both the Illinois Appellate Court and the Illinois Supreme Court gave due regard to the presumed findings of fact by the jury and carefully followed the mandate of this Court in their review of the evidence relating to the issue of actual malice. The denial of the Petition for Writ of Certiorari would furnish all of the guidance needed on the issues raised in said petition.

CONCLUSION

Wherefore, the respondents, Rhonda Rothballer and The Peoria Journal Star, Inc., respectfully submit that the Petition for Writ of Certiorari to the Supreme Court of Illinois filed by the petitioner, Frank M. Wanless, should be denied.

Respectfully submitted,

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